A

DIGEST

OF THE

LAW OF ACTIONS

AT

NISI PRIUS.

IN TWO VOLUMES.

VOL. II.

By ISAAC 'ESPINASSE, Esq.
OF GRAY'S INN, BARRISTER AT LAW.

Et Spes et Ratio Studiorum——
JUV.

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M.DCC.XC.

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CHAPTER VII.

THE ACTION OF REPLEVIN.

1. REPLEVIN is a remedy grounded on a diſtreſs, being a re-deliverance to the firſt poſſeſſor of the thing diſtrained, on ſecurity given by him to try the right, and to re-deliver the diſtreſs, if judgment be againſt him.

In treating of this action, I ſhall firſt conſider the *proceedings* by which replevin is made; 2dly, The *pleadings*, under which I ſhall conſider, 1. The nature of the action, with reference to the *things* for which it lies; 2. With reference to the *perſon*; 3. The *judgment*, *coſts*, and *damages*.

1. OF THE PROCEEDINGS IN REPLEVIN.

Theſe proceedings are either by common law, or by ſtatute, that is by *writ* or by *plaint*. Co. Litt. 145. b.

1. The proceedings at common law were by *writ iſſuing out of Chancery*, commanding the * ſheriff to cauſe the goods taken to be re-delivered to the owner. Under this writ the ſheriff might act *judicially*, and *inquire in his own court*, whether the caption was juſt or not, and give judgment accordingly; and this was for the ſpeedy determination of thoſe cauſes in which the people might want their cattle. 2 Inſt. 140. * Page 2.

But ſtill there was an inconvenience in applying to *Chancery* for the writ, on account of the diſtance and delay. This was remedied by the ſtatute of *Marlbridge*, 32 *H.* 3. *c.* 21. which orders, "that the *ſheriff* on complaint made, ſhall re-deliver the beaſts taken."

This is the ſtatute mode of replevin by *plaint*, as founded on the ſheriff's precept to re-deliver the beaſts diſtrained, grounded on the parties complaint. And for the full further convenience of the people, it is ordered by ſtatute 1 & 2 *Ph.* & *M. c.* 12. "That within two months after he receives his patent, or at his next county court, that the ſheriff ſhall depute four perſons, dwelling at leaſt twelve miles from each other, to iſſue replevins; and the ſtatute gives a penalty of 5*l. per* month for every month he neglects."

Co. Litt. 145. b. The ſheriff, under this act, may iſſue his replevin at any time; for it would be inconvenient to make the parties wait till the county-court day.

Hale's F.N. B. 169. 2 Inſt. 139. * P. 3. 2. The ſheriff may, on complaint made, order his bailiff to make replevin, either by * his precept directed to him, or *by word.* But in ſuch caſe, if done in the interval between the times of holding the county-courts, he muſt enter the plaint at the next court.

2d. But before the actual iſſuing of the ſheriff's precept to replevy, the party replevying is bound to find *plegii de retorno habendo.* The reaſon of which was, that as the common law replevin was by original writ, the plaintiff only gave the nominal *plegii de proſequendo*, the conſequence of which was, that it often happened, that after the plaintiff had got poſſeſſion of his goods or beaſts, which had been diſtrained, that he ſold them; and though defendant might afterward have judgment *de retorno habendo*, that they were not forthcoming. This was remedied by ſtatute of *Weſt.* 2. *cap.* 2. which ordered, "That the party, on ſuing out his "replevin, ſhould find pledges *de retorno habendo*; and if the "pledges were inſufficient, that the ſheriff ſhould anſwer."

Dorrington v. Edwin. 2 Show. 420. 1. Under this ſtatute, therefore, the ſheriff, whether the replevin is by writ or plaint, before he grants the one, or executes the other, muſt take pledges, as well *de proſequendo*, as *de retorno habendo.*

Dalt. 440. 2. The *plegii de retorno habendo* may be *by bond*, and that too of the plaintiff in replevin himſelf, the condition of which ſhould be, not only that the plaintiff would proſecute the ſuit, but alſo that he would make return of the beaſts, if ſo * P. 4. adjudged in law, and * alſo ſave harmleſs the ſheriff for their delivery.

Moyſer v. Gray. Cro. Car. 322. 3. But the ſheriff cannot take *money or other cattle*, as a pawn or ſecurity, in the nature of pledges *de retorno habendo*; for the proceſs to bring the pledges into court, is by *ſcire facias*, to ſhew cauſe, &c and ſo to have money or goods as pledges would be an abſurdity.

Richards v. Acton. 2 Black. Rep. 1220. 4. If inſufficient pledges *de retorno habendo* are taken, the ſheriff, the under-ſheriff, and the replevin clerk, (that is the officer appointed to make replevins, under ſt. 1 & 2 *P. & M.*) are all liable to the defendant, who has judgment *de retorno habendo.*

Dorrington v. Edwin. 3 Mod. 56. If the proceedings are by plaint, and removed by *certiorari*, and defendant has judgment, he may have a *ſcire facias* againſt the pledges.

Prowſe v. Pattiſon. Hill. 13 G. 2. Bull. N. P. 60. But he may have his *action on the caſe* againſt the ſheriff, if the pledges are inſufficient, without any previous *ſcire facias* againſt them.

Though he has a more ſummary mode, by motion, as was the caſe of *Richards* v. *Acton*, ante.

In

In the proceedings againſt the ſheriff, ſome evidence muſt be given by the plaintiff, of the inſufficiency of the pledges or ſureties; but very ſlight proof is ſufficient to throw the proof on the ſheriff: for the ſureties are known to him, and he is to take care that they are ſufficient, * as if he does not produce or name them, it is ſufficient to charge him. *Richards* v. *Acton*, ante. Saunders v. Darling. Sittings Trin. 10 G. 3. C. B. Bull. N. P. 60. * P. 5.

5. Beſides thoſe pledges, which are diſcretionary in the ſheriff, he is ordered by ſtat. 11 *G.* 2. *c.* 19. "To take *a* "*bond with two ſureties*, in a ſum double the value of the "goods diſtrained, which bond may be aſſigned to the de- "fendant, and if forfeited, may be ſued in the name of the "aſſignee."

3. When, therefore, the ſheriff has taken theſe ſteps, he muſt then iſſue his precept, directed to his bailiff, to make replevin, and cauſe the goods to be delivered to the plaintiff. Hale's, F. N. B. 168. 2 Inſt. 139. 140.

And by ſtat. of *Marlbridge*, "If the replevin is to be made "within a liberty in the county, the ſheriff ſhall make his "precept to the bailiff of the liberty, to make deliverance, "and if he neglects or makes no anſwer, the ſheriff ſhall, "without further notice, do it himſelf."

And by the ſame ſtatute, "if the diſtreſs had been made "in the county at large, but impounded within the liberty, "the ſheriff might, without any previous warrant to the "bailiff, enter the liberty and make the replevin;" for the caption, which is the thing complained of, was in the county at large.

* And by ſtat. *Weſt.* 1. 3 *Ed.* 1. *c.* 17. "If the diſtreſs had "been driven into any ſtrong hold, the ſheriff, after de- "mand might break open doors to make replevin." * P. 6.

4th. When the ſheriff has therefore given poſſeſſion of his goods to the plaintiff, if the replevin has been by plaint, the defendent has a day given to him in court to appear. If the replevin has been by writ *alias* or *pluries*, there no day is given, for the plaintiff has poſſeſſion of his own goods, and the defendant is ſuppoſed to have a demand againſt him for which he diſtrained, it is his buſineſs to make the plain- tiff declare. For which purpoſe he may at any time have a rule of court to compel the plaintiff to declare. So plaintiff may of his own accord come into court and declare, after which defendant is by attachment brought into court to plead. Dalt. 438. Hale's, F. N. B. 169. Gawen v. Ludlow. Roll. Ab. 581. Dalt. 440.

But as it often might happen that the ſheriff might be partial or negligent, or the matter might be of conſiderable conſequence, in ſuch caſe the replevin may be removed into the courts above, which is the 5th proceſs I ſhall conſider.

This is by writ of *pone* or *recordari*, the difference of which is that the *pone* lies where the proceedings in the county 2 Inſt. 139.

court have been by *writ*, but the *recordari* where they have been by *plaint*. Which proceedings the ſheriff is ordered by the writ to record and certify them to the court above.

* P. 7. * The *plaintiff* may ſue out either writ, *without any cauſe ſhewn*, becauſe it is his own delay, but the *defendant muſt aſſign a cauſe*. And theſe are good ones. That either party is related to the lord or ſheriff: That they are intereſted, &c. And by ſtat. *Weſt.* 2. *c.* 2. "If the diſtreſs had been made "for cuſtoms or ſervices, and plaintiff pretends to be out of "the fee, this was good cauſe to remove the cauſe to try "the tenure."

2. OF THE PLEADINGS IN REPLEVIN.

When therefore the plaintiff is brought into court, or comes voluntarily, the firſt ſtep is to declare. I ſhall therefore firſt conſider the

Declaration.

1. The writ of replevin complains of two things: 1ſt, The unlawful *taking*. 2dly, The unjuſt *detention*. In the declaration it is therefore to be obſerved,

Petrec v. Duke. Lutw. 1150. Hale's, F. N. B. 169.

1. That if the ſheriff has to the writ returned *replegiari feci*; there the replevin goes only for damages for the caption, and the declaration is in the *detinuit*. But if the ſheriff has not made the return of *replegiari feci*, there the declaration muſt be in the *detinet*, for the plaintiff in the latter caſe has not poſſeſſion of his goods or cattle; and he ſhall in this caſe recover as well the value of his goods, as damages for their unjuſt detention.

* P. 8. Moore v. Clipſam. Stile 71.

* 2. "The declaration ſhould be certain in ſetting out the "number and kind of cattle or goods diſtrained." For otherwiſe the ſheriff would not know how to make deliverance, if it ſhould be neceſſary. Though this fault might be cured by the avowry, both parties agreeing on the number and nature of the things taken.

Bull. N. P. 53.

But in ſuch caſe the ſheriff may require the defendant to *ſhew him the goods*. And it would be a good return to ſay *nullus venit ex parte defendentis ad oſtendendum bona & catalintei*, was held ill for the uncertainty of the deſcription.

Kempſter v. Nelſon. Gilb. Rep. 233. * Brown v. Mattaire. 2 Stra. 1015. † Read v. Hawke. Hob. 16.

On this ground a declaration in trover *de una parcella* * But a declaration for fourteen ſkimmers and ladles held to be good.

3. † It is not ſufficient for the plaintiff to ſtate generally in his declaration, the taking inſuch a vill or place generally for a venue, but he muſt particularly ſet it out, "*as at a certain place called, &c.*" For by alledging the vill generally

per

perhaps defendant might have a right of freehold there himself, but by mentioning the particular place in the count, it shews defendant to what to make title. But this should be taken advantage of by special demurrer. For if defendant does not demur, but pleads *non cepit*, the count shall stand, for if there was no taking, the place is immaterial. Ward v. Laville. Cro. Eliz. 896.

* But where defendant so pleads *non cepit*, the plaintiff must prove the taking *at the place mentioned in the declaration*. For as the defendant on this issue does not insist upon a return, but denies the taking, the place is material to ascertain the fact as laid. * P. 9. Johnson v. Wollyer. 1 Stra. 507.

4. The plaintiff may declare for several takings, and at several places, part at one time or place and part at another: And if the plaintiff alledges two places, and the defendant answers only to one, that is if the plea begins as an answer to the whole, which in fact is but an answer to a part, it is a discontinuance, and the plaintiff must not demur, but take his judgment for that by *nihil dicit*; for if he demurs or pleads over, the whole action is discontinued. Hale's, F. N. B. 168. Bull. N. P. 54. Weeks v. Speed. Salk. 94. Ib. Salk. 179.

2dly. *Of the Pleas by Defendant.*

Pleas by the defendant are either in abatement or in bar.

Pleas in Abatement

are either such as of themselves induce a return, or such as require a conusance or claim.

As first, if defendant pleads, "*that the goods are the property of himself, or of a stranger.*" This plea neither denies, confesses, nor avoids the caption, but shews that plaintiff not having any property in the goods, has no right to have * them delivered to him, that therefore the writ should be quashed, and he, (defendant,) have a return of the goods. Wildman v. North. 2 Lev. 92. * P. 10.

Therefore in pleading such matter defendant need make no claim or suggestion to entitle him to a return, because he had possession of the goods before the replevin, of which he was deprived by plaintiff, who had no right. Butcher v. Porter. Salk. 94.

2. As to the second case,

If defendant pleads "that the goods were the property of the plaintiff *and another person*," as this plea only goes to the form of the writ (the plaintiff alone not having the property) defendant must add a conusance or claim to entitle him to a return. Co. Litt. 145.

So if the plaintiff declares of a taking *in one place*, and defendant pleads that he took the goods *at another*, in this case he must make conusance or avow for a return; for such plea does not disaffirm property in the plaintiff, and defendant must shew a right either of possession or property to have a return. Foot's Case. Salk. 93.

And

Watts v. Hagden. Cro. Eliz. 372.

And in ſuch caſe the plaintiff ought not to traverſe the matter of the conuſance; if he does, and demurrer be joined on it, it is a diſcontinuance, and defendant ſhall have judgment on it. He ſhould only reply to the place traverſed, for to reply to the conuſance would be to plead double.

* P. 11. Co. Litt. 345 b. Id.

* For note, That it is a general rule that the plaintiff muſt have the property of the goods in him at the time of the taking, or he cannot maintain replevin. But a ſpecial property will be ſufficient to maintain the action. Therefore if the defendant claims property in the cattle or goods, the ſheriff cannot make replevin, for that might be to give the goods to a perſon who had no right to them. This is where the replevin is by plaint; and in ſuch caſe the plaintiff may have a writ *de proprietate probanda* directed to the ſheriff, who is by an inqueſt to inquire into the property, and if it be found for the plaintiff, he muſt make deliverance; but if for the defendant he can proceed no further. But if the replevin has been by writ, if defendant claims property, the ſheriff ſhould make his return to that effect, and the ſuit ſhall go on in the *Common Pleas*, where the property ſhall be finally tried. It is in this ſtage the pleas before mentioned come into queſtion.

2d. Pleas in bar are of three ſorts:

1. The general iſſue, which is *non cepit*; 2. The ſtatute of limitation; 3. A juſtification; 4. The avowry or conuſance. And,

1. *Of the General Iſſue, Non cepit.*

Bro. Rep. 5.

This plea confines the iſſue to the *taking*; for it allows the property to be in the plaintiff, and therefore that being admitted by the * plea, no evidence ſhall be admitted to diſprove it.

* P. 12.

1 Stra. 507. Bull. N. P. 54.

2. If defendant pleads *non cepit*, it confines the taking to the place mentioned in the declaration; ſo that defendant may prove the taking to be at a place different from that laid in the declaration, and it ſhall be good.

Walton v. Kirſop. Mich. 8 G. 3. C. B. Bull. N. P. 54.

This is, provided the defendant never had the cattle in the place mentioned in the declaration at all; for if the plaintiff can prove that defendant had them in the place laid, he will have a verdict; though if the fact is, that defendant took the cattle at another place and only had them in the place mentioned in the declaration, in the way to pound, he ought to ſhew that matter ſpecially.

2. *Of the Statute of Limitation.*

2. It is enacted, by ſtat. 21 *Jac.* 1. *c.* 16. "That actions of replevin muſt be brought within *ſix years* after the cauſe of action accrued; ſo that the ſtatute of limitations is a good plea in bar."

3

3. *Of the Juſtification.*

" A plea in juſtification admits the caption, but denies the " injuſtice of it."

As is the plea, claiming property, either in defendant himſelf, or in a ſtranger, which, before it was ſhewn, might be pleaded in abatement: But it may alſo be pleaded in bar, as it deſtroys all right of action in the plaintiff: For if the property is in defendant himſelf, it is clear; and if it is in a ſtranger, defendant is intitled to hold the goods againſt all perſons but the ſtranger himſelf, and therefore has a right to a return. * P. 13.

Preſgrave v. Saunders. Salk. 5. Wildman v. North. 2 Lev. 92.

Therefore, where defendant pleaded, that at the time of the taking the property was in Lord *North*, not in the plaintiff, he was held to be intitled to a return.

Sir Nicholas Bacon's Caſe, Cro. Eliz. 475.

2. A diſtinction is to be obſerved between an avowry and a juſtification.

An avowry always goes for a return, and therefore ſhews a ſubſiſting right at the time of the avowry, as made for rent, *ex. gr.* But a plea in juſtification does not always go for a return. As, for example, where the original taking was lawful, but is not ſo at the time of the plea pleaded.

Bull. N. P. 55. Danv. Ab. 652.

As where the lord diſtrained for homage, the tenant died, and then his executors brought replevin, the lord ſhould *juſtify* the caption, becauſe it was lawful when made; but it not being lawful to detain the goods after the tenant's death, he therefore could not *avow*; for he was not intitled to a return, though he was exempt from damages.

Roll. Abr. 319.

4. *Of the Avowry.*

An avowry is an acknowledgment by the defendant of the taking of the beaſts or goods, * and ſetting forth the cauſe of taking them, for the purpoſe of having a return. * P. 14.

If the defendant was not acting in his own right, but as bailiff to another, he is not ſaid to *avow*, but to make *cognizance.*

Under this head, I ſhall conſider, 1. The form, or how the avowry is made; 2. The avowry conſidered with reference to the things for which it lies, which includes, 1. For what good cauſes it may be made; 2. For what it cannot be made. And firſt,

How the Avowry is to be made.

1. At common law the lord was obliged to avow on his real tenant. When alienation became frequent, this was attended with much difficulty, but was remedied by ſtat. 21 Hen. 8. *c.* 19. which enacted, " That the lord might diſtrain " on the lands holden of him, and avow generally, as within " his fee, *without naming any tenant in particular.*"

1. Though

9 Co. 22. a. 1. Though the words of the ſtatute are, that the lord may diſtrain *on the lands* within the lord's fee; yet if the beaſts have been driven off, but purſued by freſh ſuit, the lord may diſtrain *off* the lands.

Co. Litt. 208. b. 2. Notwithſtanding the ſtatute, the lord may ſtill avow either at common law, or under the ſtatute, at his election; for the words of the ſtatute are, *may* avow.

* P. 15. Ibid. * 3. Though the lord may avow, without naming any perſon againſt whom he ſo avows; yet he muſt alledge ſeiſin by the hands of ſome certain tenant, within forty years.

Ibid. 4. If defendant avows, according to the ſtatute, every plaintiff in the replevin or ſecond deliverance, may have every anſwer to the avowry that is ſufficient; except diſclaimer, which he can't have, as the lord avows upon no one certain, § 4. ſtat. 21. *H.* 8.

Lucy v. Fiſher. Cro. Eliz. 146. 5. Defendant, in his avowry, *mentioned the name of the tenant*, which the ſtatute does not require, but concluded "*ſecundum ſtat.*" &c. It was nevertheleſs held well within the ſtatute, though the name ſhould not have been mentioned.

Broker v. Smith. And. 159. 6. Where the tenant conveyed to the king, and the king granted the land over to *B.* the lord, it was held, could not avow upon *B.*; for by the tenant's grant to the king, the tenure was at an end, as the king could not hold of a ſubject. Therefore the lord ſhould have declared according to the circumſtances of his caſe.

Scilly v. Dally. Salk. 562. Co. Litt. 283. Note, If in replevin, either party avows or juſtifies under a particular eſtate, the commencement of it muſt always be ſhewn.

This ſtatute is general, and extends to all diſtreſſes made by the lord, as for rents, cuſtoms, ſervices, &c.

* P. 16. * And its proviſions have been more univerſally extended as will appear under the head of rents.

4. Theſe caſes go to the form of pleading. I ſhall now conſider *Replevin with reference to the things for which it lies or what are good cauſes of Avowry.*

1. *What are good Cauſes of Avowry.*

Wherever the party has a right to diſtrain, there he may well avow the taking.

Under this, it will therefore be for conſideration for what cauſes by law a diſtreſs may be made.

The firſt I ſhall conſider is for

Rent Arrear.

Co. Litt. 142. By the common law, a power of diſtraining for rent was annexed to the perſon to whom the fealty of the land belonged, and whenever he made any grant reſerving the fealty and rent to himſelf, this was called *rent-ſervice*, and for it by common law, he could diſtrain.

Litt. § 217. But where he parted with the whole fee, reſerving a rent but in the grant reſerved a power of diſtreſs, if the rent was

in arrear, in * this case, as the power of distress arose under the grant, it was called a *rent-charge*. * P. 17.

Rents sec are rents granted in like manner as rent-charges, but with no clause in the grant reserving the power of distress: for these therefore no distress could be made at common law. But 'tis now enacted by statute 4 *Geo.* 2. *c.* 28. "That rents sec, rents of assize, and chief rents, may now "be distrained for:" so that now all rents are on the same footing, in point of distress. Litt. § 218.

But, 1st, If the clause in the lease is, "That if the rent be behind, *being demanded at another place beside the land, or of the person of the lessee*, that the lessor may distrain," there, if lessor distrains without any demand, it is unlawful; for the form of the demand is different from what the law requires. Brown v. Dunnery. Hob. 208.

But if the clause is, "That if the rent be behind, *being lawfully demanded*, that then he may distrain;" it is no more than the law speaks, and therefore the lessor may distrain, without a previous demand; for the distress is itself a demand. Maund's Case. 7 Co. 28. b.

"But where there is any *penalty annexed*, there a demand must be laid."

As where the avowry was for rent, and a *nomine pœnæ*, and no demand alledged, the avowry was held to be clearly for the *nomine pœnæ*, for the want of a demand; but *good for the rent: and defendant had return for that. Howell v. Sambach. Hob. 133. * P. 18.

But where the issue was on a collateral matter, *viz. non dimisit*; though there was no demand laid of the *nomine pœnæ*, it was held to be cured by a verdict. Sir Th. Wentworth's Case.

2. "Where a man is *sole seised, or has title to an entire rent*, he should distrain for it all at once; for the law will not allow multiplicity or splitting of actions." Hutt. 42.

And therefore, if defendant avows for half a year, or a quarter's rent, he should set out how the rest was satisfied; or otherwise there may be another distress and avowry. Sir Th. Holt. v. Sambach. Cro. Car. 103.

"But if defendant avows for more than is due, though the avowry is for that reason bad; yet it may be cured."

As where he avowed for rent due at *Michaelmas*, and the distress appeared to have been made on the 26th day of *September*, which was three days before *Michaelmas*. It was held, that though the avowry was bad, (for the judgment to have a return irrepleviable, *till all the rent avowed is paid*, and so would be for more than was due;) "yet that defendant might, before judgment, *abate his avowry for so much as was claimed to Michaelmas*, and take his judgment for the rest." Richards v. Cornforth. Salk. 580. 8 Co. 45. b.

"But

* P. 19. * " But where one is not ſo ſeiſed, or *has not a ſole title to* " *the whole rent*, he cannot avow alone, or his avowry ſhall " be bad."

Stedman v. Bates. Salk. 390. As where in replevin defendant made *conuſance* as bailiff to the Counteſs of *Saliſbury*, for rent-arrear, and ſhewed that the leſſor was ſeiſed in fee, and died, and the reverſion deſcended to the Counteſs of *Sal.ſbury, and her ſiſter*. On demurrer, the court held the conuſance to be bad; for the rent is an entire inheritance, and the two ſiſters make but one heir, and ſo ſhould have joined.

3. " Though defendant may have good title to the rent, " yet may the diſtreſs be tortious."

8 Co. 147. a. As if he comes on the land to diſtrain, and the tenant then tenders the arrears due; in ſuch caſe, if he diſtrains the cattle, it is tortious, and defendant may replevy.

Crawley v. Stilling-worth Hutt. 13. But it is not ſufficient for the tenant to ſay that he was on the land on the day, and ready to pay the rent; for if he did not make a *tender at the time of the diſtreſs made*, the taking is not tortious.

Pilkington v. Haſtings. Cro. Eliz. 813. And *the tender muſt be before the impounding*; for then the goods are in *cuſtodia legis*.

4. Many difficulties formerly occurred in avowries, from the circumſtance of requiring defendant to ſet out his title at large.

* P. 20. * This has been remedied by ſtatute 11 *Geo.* 2. *c.* 19. which enacts, " That defendants in replevin may avow generally " that plaintiff held under ſuch an article, &c. at ſuch cer- " tain rent, during the time that the rent ſo diſtrained for " incurred, which rent ſtill remains due, without ſetting " out the grant, tenure, or title of ſuch landlord or leſſor."

Sullivan v. Stradling. 2 Wilſ. 208. This ſtatute was made for the benefit of landlords, that after the tenant had enjoyed the land, he ſhould not be allowed to pry into leſſor's title: Therefore, if defendant avows under the ſtatute, *nil habuit in tenementis* is a bad and inadmiſſible plea, for it attempts to bring the leſſor's title in queſtion; for if the premiſes were in mortgage for example defendant, if this plea was allowed, could not recover his rent, which the ſtatute never had in contemplation to prevent, but rather to aſſiſt.

Adams v. Croſs. 1 Vent. 182. Before this ſtatute, *in caſes of copyhold*, where the title did not come in queſtion, as in avowry for rent, it was ſufficient for defendant to ſtate his being ſeiſed, &c. according to the cuſtom of the manor, at the will of the lord, without *ſtating any admiſſion* under the ſurrender.

5. By ſtatute 32 *Hen.* 8. *c.* 37. " The executors and ad- " miniſtrators of tenant in fee, in tail, or for life, of rent " ſervices, rent-charges, rent-ſec, or fee-farms, may diſtrain " upon the lands, chargeable ſo long as they remain in the " tenure

"tenure and occupation * of the tenant, who ought to have * P. 21.
"paid, or any perſon claiming under him, by purchaſe,
"gift, or deſcent."

"And the ſame remedy is given to huſbands ſeiſed in
"right of their wives or other perſons, after the death of
"*ceſtui que vie*."

Under this ſtatute, it has been held,

1. "That it extends but to *the perſons mentioned in it, as*
"*executors*, &c. not to others, though in ſimilar circum-
"ſtances."

As where tenant for life of a rent-charge confeſſed a judgment, and an *elegit* iſſued, under which the rent-charge was extended: Tenant for life died, and *conuſee diſtrained and avowed* in replevin, for the arrears incurred in the life-time of tenant for life. On demurrer, it was held to be a bad diſtreſs, and not warranted by the ſtatute: 1ſt, Becauſe the caſe of a conuſee is not enumerated in it; 2dly, Becauſe he comes in in the *poſt, not under* the tenant for life. Pool v. Duncomb. Trin. 1657. Bull. N. P. 56.

2. The words of the ſtatute are, "of tenants in fee-tail, "or *for life*." This, Lord *Coke* ſays is to be intended of tenants *pur auter vie* ſo long as *ceſtui que vie* lives, who may diſtrain under the ſtatute, though by common law they could not do ſo. Co. Litt. 162.

But it has ſince been extended to all *tenants for life*. Per Cur. 1 Raym.

* The ſtatute makes no mention of *leaſes for years*, and therefore it ſhould ſeem, that, the executors of leſſee or grantee of a rent-charge for years, if he ſo long live, were not within the ſtatute, and ſo could not diſtrain for arrears due in the life-time of their teſtators; for the land-lord is not tenant in fee-ſimple, fee-tail, or for life, of ſuch a rent. * P. 22. 173. Turner v. Lee. Cro. Car. 471.

However in an action of treſpaſs for diſtraining plaintiff's goods, it appeared, that defendant was an executor, and diſtrained the plaintiff's goods for rent-arrear due to his teſtator, on a leaſe for years, and Lord Chief Juſtice *Lee* held the caſe to be within the ſtatute; and defendant had a verdict. Powell v. Killick. Weſt. Mich. 25 Geo. 2. Bull. N. P. 57.

But it has been held that the ſtatute does not extend to rents out of copyholds. Appleton v. Doily. Yelv. 135.

3. The ſtatute gives no new right of diſtreſs which the teſtator had not; therefore if the tenant had granted away or deprived himſelf of the right of diſtraining, the executor cannot do it. Co. Litt. 162. b.

4. So under the words of the ſtatute, the diſtreſs can only be made *on the tenant, in whoſe hands the lands were chargeable, or ſome perſon claiming under him*; and therefore not in the hands of a perſon claiming by title paramount. As if the lands ſhould *eſcheat*, a diſtreſs could not be made when in the hands of the lord. Ibid.

And

* P. 23. *And therefore it is always neceſſary in an avowry by executors or adminiſtrators, who have diſtrained for rent-arrear, that they aver "that the land remains in the poſſeſſion of the tenant who ought to have paid, or ſome perſon who claims under him; for to ſuch caſes only does the ſtatute extend.

Miles v. Willoughby. Cro. Eliz. 547.

5. If a perſon diſtrains as executor or adminiſtrator, he muſt bring himſelf within the ſtatute. But where the avowry was *as adminiſtratrix* of rent, to which the defendant was *intitled in her own right*; ſhe nevertheleſs had judgment, that part reſpecting the claim as adminiſtratrix, being rejected as ſurpluſage.

Brown v. Dunnery. Hob. 208.

And note, in general, that if defendant avows for rent in arrear at *Michaelmas*, and at the time of the taking, the avowry is good though it does not ſay "*and which is yet unpaid*;" for the avowant avoids the injuſtice of the caption, if he ſhews that the rent was in arrear, *at the time of taking the diſtreſs*: and no tender after could make the diſtreſs illegal.

Bowles v. Poor. Cro. Jac. 283.

And ſo there may be judgment in replevin, though the party miſ-recites his title, provided he ſhews a good and ſubſiſting one. As where, in this caſe, the party ſtated himſelf as intitled, under a leaſe made the 30th of *March*, and the jury found it the 25th of *March*; it was held to be good enough to give the party a title.

Pope v. Skinner. Hob. 72.

* P. 24. * 2. The next caſe of avowry, for a lawful diſtreſs, which I ſhall conſider is where the taking has been for

Damage Feaſant.

This taking of cattle or goods damage feaſant may be either for a treſpaſs done, 1ſt, To one's own land; 2dly, To commons.

Co. Litt. 142.

1. In the caſe of diſtreſſes for damage feaſant to *one's own land*, it is ſufficient to obſerve, 1. That the diſtreſs for rent may be made *in the night*, which in the caſes of diſtreſs for rent it cannot be; 2. That the diſtreſs muſt be made while the beaſts are actually on the land, for if they are driven off before they are ſeized, the perſon on whoſe land they were cannot follow and ſeize them.

Id. 161.

3. Where the diſtreſs is for damage feaſant, the party may tender amends till the cattle are impounded: but after that it is too late, and a tender to the bailiff is not good.

Pilkingtons Caſe. 5 Co. 76.

2. In the caſes of diſtreſſes for damage feaſant in *common* the queſtion is of more extent.

Injuries to the commoner's right of common may be committed, 1ſt, By the *lord* putting in beaſts not commonable as hogs or goats; or by ſurcharging it; 2dly, By *another commoner*

commoner who is guilty of the ſame offence; * 3dly, By a mere *ſtranger* putting his cattle on the common. * P. 25.

2. *As to the Lord.*

It is a general rule, that a *commoner cannot diſtrain the lord's cattle for ſurcharging the common*, except in the caſe where the lord has at the time *no right to put any cattle at all on the common*. 1 Danv.Ab. pl. 6. quot- 4 Burr. 2430.

As where the cuſtom was, that the land was to lie *entirely freſh* every ſecond year till *Lady-day*, during which ſeaſon the lord was totally excluded; during that time he put his cattle on, and it was held that the commoner might diſtrain them. Trulock v. White. 1 Roll. Ab. 405, 406.

In the Caſe of another Commoner.

Wherever a commoner is intitled to common, *for a certain number* of cattle, as ten or twenty, there if he ſurcharges the common, another commoner may diſtrain the overplus; for in ſuch caſe the number being ſettled, the injury to the rights of others is evident. Dixon v. James. 2 Lutw. 1238.

But wherever the commoner's right of putting on cattle *is not aſcertained in point of number* (as for example, if it depends on the number of acres which he holds): ſo that he has a colour to put in his cattle; in that caſe, though he may exceed the number, another * commoner *cannot diſtrain* his cattle; but is driven to his writ of admeaſurement of common: For as well in this caſe as that of the lord before, the commoner is not to judge for himſelf *where a wrong is not clearly committed*, but muſt recur to a competent and indifferent juriſdiction, by writ of admeaſurement. Hall v. Harding. 4Bur. 2426. * P. 26.

In this caſe the commoner claimed a right of common for two ſheep for every acre he held: So where the commoner claims common for cattle, *levant* and *couchant*. In theſe caſes another commoner can't diſtrain, for the number depends on the land in the poſſeſſion of the commoner, and ſuch cattle as are neceſſary to manure it. But, 4Bur. 2431.

3. *In the Caſe of a Stranger.*

The commoner *may diſtrain his cattle without queſtion*, for he has *no colour* of right. Hoddeſden v. Greſill. Yelv. 104.

In general as to this avowry, it is to be obſerved,

1ſt, "That it is different, where it is for a number certain or uncertain."

For if a man preſcribes for a *certain number* of cattle, it is not neceſſary for him to ſay *that they were levant or couchant*; becauſe it is no prejudice to the owner of the ſoil, the number being aſcertained. Richards v. Squibb. 1Ld.Raym. 726.

But

Harding v. Johnſon. Mich. 20. Geo. 2. Bull. N. P. 59.

But where the *number is uncertain*, as levant and couchant, * P. 27. for example, a preſcription for * all cattle, *levant* and *couchant* will be good, and need not be for all his cattle; for levancy and couchancy are terms ſufficiently aſcertaining what cattle may be put in, for no more ſhall be ſaid to be levant and couchant than the land is ſufficient to maintain.

2. "If a commoner juſtifies under a right of common, "it muſt be *by good and lawful preſcription.*"

Gateward's Caſe. 6 Co. 60. b. Agnes Fowler v. Dale. Cro. Eliz. 362.

Therefore a preſcription that every *inhabitant* of a vill ſhould have common within ſuch a place, is bad.

For ſuch common would be tranſitory and uncertain, for it would follow the perſon, and for no certain time or eſtate; but cuſtom ought to have certainty and continuance.

Engliſh v. Burnell. 2 Wilſ. 258.

So on account of the ſame weakneſs of eſtate, a preſcription claimed by defendant, as *occupier of certain meſſuages*, to a right of common, was adjudged to be ill.

3. "Wherever a commoner relies on a preſcriptive right "to common, he ſhould ſet out *the whole of the preſcription* "as in fact it is."

Lovelace v. Reynolds. Cro. Eliz. 546.

For where defendant preſcribed generally to have common in the *locus in quo*, and the jury found, that he was entitled to common by preſcription, *prout, &c. paying for it 1d. yearly to the plaintiff.* It was on this verdict adjudged for * P. 28. the plaintiff, for the *paying* was part of the * preſcription, a condition precedent, and ſhould have been ſet out in pleading the preſcription.

"But where any *collateral matter is connected with the pre-* "*ſcription*, but makes no part of it, it need not be ſet out."

Gray's Caſe. 5 Co. 78. Cro. Eliz. 405. S. C.

As where a copyholder preſcribed to have common, and the jury found that he was entitled to the common, *but that it had been the cuſtom to pay yearly for the ſame an hen and five eggs* to the lord, it was held that the preſcription was well pleaded, for the payment of the hen and eggs makes no part of the preſcription, but is a collateral demand, or rather is a preſcription in the lord's favour for ſo much.

Waring v. Griffiths. 1 Burr. 440.

So where the plaintiff ſet out a preſcriptive right to bury in the chancel of the church of *Oſweſtry*, and this was found to be ſo, but further, that two ſhillings had been uſed to be paid to the church for every perſon ſo buried, it was held that the preſcription was well pleaded, for the payment was collateral, and no part of the preſcription.

4th. "Under a preſcription for common, the commoner "muſt prove the *whole* of the preſcription as he has laid "it."

* Pring v. Henley. per Ward, C. B. at Exeter 1700.

*As if he preſcribes in his avowry to have common for all *commonable cattle*, and upon iſſue joined thereon, he gives in evidence, common for *ſheep and horſes only*," it will not main- * P. 29. tain his iſſue; for a preſcription is an * entire thing. But *he had a general common*, i. e. *for all kinds of cattle*, and pre-

ſcribe

ſcribed for common *for any particular ſort*, it had been good, for it is within the general preſcription. Bull. N. P. 59.

So where the preſcription was for one hundred ſheep, and found for one hundred ſheep *and ſix cows*, it was held good. *Aliter*, if it had been found for one hundred and twenty ſheep, for that would not be the preſcription laid. Buſhwood v. Pond. Cro. Eliz. 722.

So where a commoner preſcribed for common for all the beaſts levant and couchant upon a meſſuage, *two hundred acres of land*, *fifty* acres of meadow, and *fifty* of paſture, *in four towns*, and the jury found that he had common as belonging to two hundred acres of land, twenty of paſture and meadow *in two towns* only, and not in the other; judgment was given againſt him, as having failed in his preſcription. Michell v. Mortimer. Hob. 209.

"But where the *nature* of the preſcription is found as laid, but variant only in *the quantity of land* to which it extends, the preſcription ſhall be held to be well laid, for it is the ſame preſcription."

As where one preſcribed to have common to his meſſuage, and *twenty acres* of land, and it appeared on evidence that he had but *eighteen acres*, it was held to ſupport the preſcription as laid. But if he had ten acres of copyhold and ten of freehold, he had failed in his preſcription, for he could not make a preſcription for both; ſo if it appeared on the evidence that part * of the land was copyhold an hundred years ago, though then it was freehold, there too he had failed. For as the preſcription muſt be beyond the time of legal memory, it muſt have been different then from what it was at firſt, and ſo there could be no preſcription as was held. Gregory v. Hill. Cro. Eliz. 351.

* P. 30.

"And ſo if the nature of the preſcription remains the ſame, but it is found to be *more ample* than was laid, it ſhall be good."

As where the preſcription was, to tether horſes *from* and *for the feaſt of the Pentecoſt yearly*, and the verdict found that they had uſed to do it on the day before the *Pentecoſt*, the day itſelf, and the *Monday* in the week of the *Pentecoſt*, and afterwards during the year at pleaſure. This finding being more large than the preſcription was laid, was adjudged well to ſupport it. Johnſon v. Thorough-good. Hob. 64.

Wherever a copyholder preſcribes *againſt a ſtranger*, he muſt preſcribe thro' the lord: But where he preſcribes againſt *the lord himſelf*, he muſt alledge the preſcription *by way of* grant. Pearce v. Bacon. Cro. Eliz. 350.

That is *as againſt a ſtranger*, he muſt ſay, "That the lord of the manor and all his anceſtors, and all thoſe whoſe eſtates he has, have had common in ſuch a place for him and his tenants at will," &c. and that ſhall be good for the copyholder. But as *againſt the lord*, he muſt ſay, "That within the manor there is ſuch a cuſtom," &c. Anon. Copyhold Caſe 25. 4 Co. 31 b.

3d. The

*P. 31. * 3d. The next caſe of avowry for a lawful diſtreſs is

For Fines and Amercements in Courts Leet or Baron

Hall v. Turbett. Cro. Eliz. 241. Grieſley's Caſe. 8 Co. 3. Reſ. 386.

1ſt. For offences which are within the conuſance of the ſteward of a court leet, and *of which he hath a view*, he may aſſeſs a fine, as for a contempt or diſturbance in court. But for offences not within his view, he can aſſeſs no fine *without a preſentment*, for *non conſtat*, whether the party was reſident within the leet or not, or what cauſe he had for his abſence. And therefore, where the ſteward aſſeſſed a fine *for not coming into court to do ſuit*, for which the diſtreſs was made, it was held to be ill. But it ſeems he might be amerced. For if the fine was too grievous, the party would be without remedy, but for an amercement, a *moderata miſericordia* lieth. 10 *H.* 6. *c.* 7. And note, that for a fine 11 Co. 45. a. as well as an amercement, a diſtreſs of common right belongs.

But for a fine in a court baron the lord cannot diſtrain without a preſcription.

Stevens v. Houghton. 2 Stra. 847. Parham v. *P. 32. Norton. Cro. Eliz. 885. Matthews v. Carew. Salk. 107.

2. In the avowry for taking by reaſon of an amercement the avowry ſhould ſtate "that the plaintiff *was guilty*." For herein replevin differs from treſpaſs, that in replevin defendant makes a title, and is to recover, which can only be by ſhewing * a title under *the forfeiture*. But in treſpaſs taking the goods, defendant is only to excuſe the wrong.

Therefore in *treſpaſs*, it is ſufficient to ſay, that the offence *was preſented*, for *non refert* as to defendant in ſuch caſe, whether the offence was committed or not. But in *replevin* the offence ſhould be ſet out with an averment that the party was guilty of the offence for which the amercement was made.

Brook v. Huſtler. Salk. 56.

3. In the caſe of a *court leet*, the amercement ſhould be general by the ſteward, *viz. quod ſit in miſericordia*, and then the amount of the amercement is to be aſcertained by affeerors.

In the caſe of a *court baron* the *ſteward* may in the same manner amerce.

Rowleſtan v. Alman. Cro. Eliz. 748. * Stephens v. Haughton 2 Stra. 847. 2 Reſ. † Baldwin v. Tudge. 2 Wilſ. 20.

* For if the *amercement* was *by the jury*, it would be bad, they can only affeer the amount.

† And the amercement can only be affeered by the *freeholders of the manor*.

And theſe matters now mentioned ſhould always be ſet forth in the avowry, as neceſſary to give a title to a return.

4. "And in every caſe the defendant is called upon to ſhew a good and complete title."

*As 1ſt. The avowry ſhould ſtate, "That the place where "the offence was committed was *within the manor or juriſ-* "*diction of the court*, from which the aſſeſſment iſſued." * P. 33. Wormleighton v. Burton Cro. Eliz. 448. S. C.

2. That the *crime was cognizable* in that court.

*3. That the goods taken were the *property of the perſon who made default, and was amerced*; for where the goods of his undertenant were taken, it was held to be bad under the preſcription. * Pill v. Towers. Cro. Eliz. 791.

*4. By *common right* every manor has a court baron annexed to it, and therefore where it was claimed *by preſcription*, it was held to be bad, for preſcription ſhall not be where a thing is by common right. * S. C.

5. The avowry ſhould alſo ſhew, "*that the manor was in* "*the hands of the defendant avowing, or of his principal, where* "*there is conuſance made.*"

For, where defendant made conuſance, as bailiff to the dean and canons of *Windſor*, as of their manor of *Hampton-Court*, for an amercement for not doing ſuit of court; but it appearing that the dean and canons *had let the manor*, at the time of the avowry, though they had reſerved to themſelves the profits of the manor and courts incident to it, plaintiff had judgment; *for the court is incident to the manor, and cannot by any exception or reſervation be ſevered from it.* Brown v. Goldſmith. Hob. 108.

*And laſtly, in avowing for a fine in a leet, the avowry need never conclude *prout patet per recordum*. * P. 34. Per Holt. 2 L. Raym. 1173.

4. The next caſe of avowry for a lawful diſtreſs is for

Tolls and Cuſtoms.

Under this head, I ſhall conſider tolls, 1ſt, With reference to *ways*; 2dly, To *fairs and markets*; 3dly, To *ports or quays*.

Toll conſidered with reference to *ways* is either toll thorough, or toll traverſe. Moor 574. 2 Wilſ. 299.

Toll thorough is a toll paid for paſſing over the *king's highway*; and this being againſt common right, *cannot be claimed or taken without good conſideration*; as repairing the ſtreets or ways for which it is claimed. 22 Aſſ. 58.

So that on the ground of preſcription alone it cannot be ſupported. Keilw. 148.

Toll traverſe is a toll paid for liberty to go acroſs *the lands of another perſon*; and this may be claimed by preſcription, *without any conſideration appearing*, and payment of it from time immemorial ſhall be ſufficient: But it can only be claimed from its nature *by the lord of the ſoil.* Ibid. Fitzherb. Ab. pl. 3.

1. "In claiming of *toll thorough*, the party *muſt ſhew* "*every circumſtance intitling himſelf*, or the court will lean

* P. 35. " * againſt him, from the jealouſy they entertain of thus
" levying money upon the ſubject, that is, he muſt ſhew a
" good conſideration, and that he is within the preſcription
" under which he claims."

Trueman v. Walgham. 2 Wilſ. 296.

For where defendant preſcribed to have *toll thorough*, from every cart or waggon coming from any other manor, and paſſing into the town of *Gainſborough*, on the conſideration of repairing, cleanſing, and maintaining *divers and many ſtreets*, belonging to the ſaid town; and for non-payment diſtrained. Defendant had a verdict; but judgment was afterward arreſted: For he could only claim toll on the ground of repairs, his right therefore muſt be confined to the ſtreets repaired. Defendant had laid his preſcription for repairing *divers and many* of the ſtreets of *Gainſborough* but it did not appear that the waggon on which the preſent diſtreſs was made, was going over the ſtreets repaired, and therefore the defendant might have no title.

" And therefore the party preſcribing for toll thorough " is always tied down to great ſtrictneſs in pleading."

Smith v. Sheperd. Cro. Eliz. 710.

As where defendant preſcribed to have a toll of two pence for every twenty ſheep driven through the manor of *Malton Mowbray*, by any foreigner, and if not paid, a right to *diſtrein* for the ſame, and then juſtified, that plaintiff having refuſed to pay the toll, that he *cepit et abduxit* on ſheep, and diſtreined it till the toll was paid. This juſtification was held to be * ill; for the preſcription is to *diſtrein* and the defendant has not pleaded the taking *as a diſtreſs* but only that he *cepit et abduxit*, which is not within the preſcription.

* P. 36.

Cro. Eliz. 558.

2. A ſecond ſpecies of toll for which a diſtreſs may be made, is that due in *fairs and markets*.

2 Inſt. 220.

The eſtabliſhment of public fairs and markets is a branch of the royal authority, and the king may by his grant ere new ones, and beſtow a certain toll on the perſon to who ſuch fair or market is granted. But the toll muſt be ſo petty ſum; for if the king grants a fair or market, with ceſſive toll, it is void, and the market becomes free.

Id.

So fairs and markets, and the toll incident to them ma be claimed by *preſcription*, which ſuppoſes a grant.

Heddy v. Wheelhouſe. Cro. Eliz. 558. 591.

But by the grant of a fair or market, *cum omnibus libertatibus et pertinentiis*, toll does not paſs; for it is not due common right, but muſt be given by expreſs words in t grant. This is the caſe of a grant of a new fair; but there has been an ancient fair, to which, by preſcriptio toll has been annexed, and it becomes forfeited to the kin and he grants it to another, *cum omnibus libertatibus illi ſp tantibus*, by this the toll ſhall paſs; for this is not a n grant, but a grant of an ancient fair, to which the toll b longed.

B

* But where a fair was held by cuſtom, *on a particular day*, to which toll was due; and afterward the king reciting this grant, granted to the ſame place two fairs, *on different days* from the former, *with all the profits, commodities, emoluments, liberties, and free cuſtoms ad hujuſmodi ferias pertinentia*. This was adjudged on demurrer, not to carry with it a right of toll, as not being expreſsly given, and the fair not continuing the ſame, the cuſtom could not extend to it. * P. 37. Holloway v. Smith. 2 Stra. 1171.

2. "This claim of toll being an exaction on the ſubject, "is to be taken ſtrictly according to the grant or cuſtom, "and therefore ſhall be confined to caſes only falling com-"pletely within it."

Therefore, where defendant juſtified the diſtreſs, as intitled by preſcription to a toll for *all corn expoſed to ſale in the market* of Rippon. When it appeared in evidence, that the corn was ſold by ſample *at the plaintiff's houſe*, by one *Cowper*, and that it was *only carried through* the borough on a market-day, and delivered to the plaintiff; but was *never expoſed in the market*. On this evidence, the taking was adjudged to be unlawful, as not being within the preſcription, and though it might be *a fraud* on the market, yet that could not in this action be remedied, but ſhould be ſued for by an action on the caſe. Blakey v. Dimſdale. Cowp. 661.

And note,

* 1. "That tenants by *ancient demeſne* are excuſed and diſcharged from the payment of all tolls, by reaſon of their tenure; but this is for the toll due in carrying the *produce of their lands*, not for merchandiſe. * P. 38. Ward v. Knight. Cro. Eliz. 227.

* 2. That though goods brought to public market may be diſtrained for *toll*, yet they cannot for *damage feaſant*; for every one is of common right intitled to bring his goods and expoſe them to ſale in a public fair or market. * Mayor of Launceſton's Caſe. Cro. Eliz. 75. Id. 627.

3. Tolls due for landing goods at *ports or quays*, are now to be conſidered; for which, if not paid, a diſtreſs is lawful. S. P.

1. Every common river is as an high ſtreet, and therefore ſubject to the ſame law as to toll, as was before mentioned in the caſe of highways. Salk 249. 2 Brownl. 181.

And therefore, where the city of *Norwich* claimed a toll on all goods paſſing on the river, by ſuch a quay or wharf, *without ſhewing any conſideration*, as cleanſing the river or repairing the banks, &c. On demurrer, judgment was given againſt them. Heſhford v. Wills. 1 Sid. 454.

2. So the landing of goods at any port or quay is *of itſelf* conſideration as a benefit to the public, and a toll for it may be claimed *by preſcription only*, as in the nature of toll *reverſe*, *without ſetting out any conſideration*, the ownerſhip of the ſoil being ſufficient. Mayor of Exeter v. Trimlett. quot. 3 Burr. 1405.

* So, in an action for toll of a wharf at *Gainſborough*, the plaintiff claimed as lord of the manor, a toll by preſcription, for Mayor, &c. of London * P. 39. v. Hunt. 3 Lev. 37. S. P.

Colton v. Smith. Cowp. 47.

for all goods *landed within the manor*, and having ſet out a conſideration, viz. the keeping a wharf within the manor in repair, though he claimed toll for goods landed at any part of the manor, it was inſiſted, that as he grounded the claim of toll on the conſideration of repairing the wharf, that as that would confine the toll only to goods landed at the wharf, that he had failed in his preſcription. But he had judgment notwithſtanding; for this claim is in the nature of toll traverſe, in which no conſideration was neceſſary to be ſtated by the party claiming, it being ſelf-evident. For if the goods are landed on the manor, they have the benefit of plaintiff's private property, and if at the wharf the benefit of *it*.

Mayor of Yarmouth v. Eaton. 3 Burr. 1402.

But if it differs from toll traverſe, that it is not neceſſary that the parties claiming it ſhould *be owners of the ſoil*, that is *of itſelf* a ſufficient title, as in the laſt caſe is ſo ſtated. And if that does not appear, yet it ſhall be good; for the crown has a right to create the duty, and may grant it to another, though it retains the port, and if no grant appears, it may be claimed by preſcription.

Mayor of Kingſton upon Hull v. Horner. * P. 40. Cowp. 102.

As where the *corporation* of *Kingſton* upon *Hull* claimed certain toll called water-bailiff's dues *by preſcription*; and in evidence it appeared, that their charter was in 27th of *Ed.* 3. and ſo full a century within the time of legal *memory* (time of *Rich.* 1.) and therefore it was inſiſted, 1ſt, That the corporation could not preſcribe; and, 2dly, That by a ſubſequent charter in 5 *Rich.* 2. the port was created, and that therein no duties were granted to the corporation. But it appearing that theſe duties had been paid for 350 years, and that the grant of the port was in theſe words, "portum *dudum* vocat Sayrecreek jam Hull." On theſe circumſtances the court were of opinion, that it was matter of preſumption to be left to the jury, whether the word *dudum* did not imply an exiſting port before the making of the charter of *R.* 2.? and whether the payment of the duty for 350 years, viz. from 1441 to 1764, (the time of the action), would not be ſufficient to ſupport the preſumption of a grant from the crown, of thoſe duties, between the times of 5 *Rich.* 2. (*anno* 1382) when the charter creating the port was granted, and 1441 when the firſt payment was proved. On this ground a verdict was found in favour of the corporation's right to toll.

3. "As therefore preſcription alone, in theſe caſes "toll, is ſufficient, on the ground of the benefit derived "the ſubject from the uſe of the port or quay; where the "benefit is not enjoyed, no toll is payable, that is, uſer "the port is neceſſary to give a claim to toll."

For where defendant avowed for toll as due from all ſhips unlading at the quay, on the *ground of repairing the port. In evidence, it appeared, that the quay extended but half a mile, and that the ſhip in queſtion had unloaded ſeven miles from the quay, the preſcription was adjudged not to extend beyond the quay, and that plaintiff was not liable to the payment of toll, he not having uſed the quay. Prideux v. * P. 41. Warne. Sir T. Raym. 232. 2 Lev. 96.

So where a cuſtom was alledged in the city of *Norwich*, that in regard that they maintained a common quay for the unloading of goods brought up the river in veſſels to the ſaid city, that every veſſel paſſing *through the ſaid river by the ſaid quay*, ſhould pay a certain ſum. This was held to be a void cuſtom; for it ſhould not extend to thoſe veſſels which never unladed at the port, and ſo derived no benefit from it. Haſpert v. Wills. 1 Vent. 71.

4. "In preſcribing for a toll or cuſtomary payments, it "ſhould be for a *ſum certain and defined.*"

But a preſcription to have three buſhels out of every cargo of barley brought to the quay of *Penzeance* was held good, though the cargoes might be of different magnitudes; for the word *cargo* is a mercantile word, and ſufficiently certain and determinate. Serjeant v. Read. 1 Wilſ. 91. 2 Stra. 1228. S. C.

5. If a perſon juſtifies the ſeizing of any goods, &c. he ſhould ſtate the particular cauſe of ſeizure as for toll, forfeiture, or cuſtom; and 2dly, It ſeems that he ought to ſay that it had been *uſual* to ſeize; for it is no cuſtom or preſcription, if not put in uſe. Clearywalk v. Conſtable. Cro. Eliz. 110.

*5. Another good cauſe of diſtreſs, and ſo of legal avowry, is for * P. 42.

Suit and Services, or other Things claimed by Cuſtoms of a Manor.

As firſt for an *Heriot*.

If defendant avows the taking *for an heriot* generally it is bad, it ſhould be for the *beſt beaſt* or ſo, that ſo plaintiff might have his replication, that the deceaſed had no beaſt; and beſides the heriot might be of a thing different from that taken, as it may be a *jewel* or *piece of plate*, as well as the beſt beaſt or living thing. Shaw v. Taylor. Hutt. 4. Hob. 176. S. C.

And where the lord is intitled to *Heriot ſervice*, he may diſtrain generally, or ſeize *any beaſt* of the tenant. For it is at his election to take what beaſt he deems the beſt; but for *heriot cuſtom* he muſt take the beaſt itſelf, not another as diſtreſs for it; for it lies in prender and not in render. Odiham v. Smith. Cro. Eliz. 589. Major v. Brandwood Cro. Car. 260.

2. "But wherever any ſum is claimed as due by cuſtom, it muſt be a reaſonable one; for if unreaſonable, it is void."

As where defendant made conuſance as bailiff to the dean and chapter of *Canterbury*, to whom plaintiff was leſſee, and claimed Holland v. Lancaſter. 2 Vent. 134.

claimed that by the cuſtom of the manor, the leſſee on alie-
nation, was to pay a fine of a year and a half's rent, and
* P. 43. * if not paid, a diſtreſs. On demurrer, the plaintiff had
judgment; for the cuſtom was unreaſonable, as ſo upon
every alienation of even the ſmalleſt part, the ſame fine is
due.

Parker v. Combleford Cro. Eliz. 725.

So where the lord claimed by cuſtom the beſt beaſt of *every ſtranger*, dying within the manor, as an heriot. On demurrer, the cuſtom was adjudged to be ill; for it cannot be ſuppoſed to have a reaſonable or lawful beginning, as in the caſe between the lord and his tenants, who may be ſuppoſed to have made the agreement when their tenures began, as a ſpecies of conſideration; but no ſuch conſideration or agreement can be ſuppoſed to ſubſiſt in the caſe of a ſtranger.

"And wherever defendant, in his avowry, relies on a "cuſtom, he ſhould ſet out *the whole of it.*"

Griffin v. Blandford. Cowp. 62.

For where defendant avowed under a cuſtom, that the lord of the manor was intitled on the death or alienation of every tenant, to the ſecond beſt beaſt, and if but one, the to that beaſt, and if no beaſt then to a compenſation in lieu of it. Upon evidence, the cuſtom appeared to be ſtated *but with an exception* of meſne ſigniories, burgage-tenures and alienations to the uſe of the alienees and their heirs, and the avowry was for that omiſſion held to be ill.

Richard Godfrey's Caſe. 11 Co. 42.

3. Defendant avowed the taking of two cows in the caſe; for cauſe, that he was ſeiſed of the manor of *Bethel* in *Norfolk*, and that * from time immemorial he and thoſe, &c.
* P. 44. had been intitled to a leet within the ſaid manor, and that the ſteward had uſed to ſwear twelve of the inhabitants, as chief pledges, to preſent all things within the leet, and that they had been uſed to preſent, that they ſhould pay themſelves to the lord ten ſhillings *pro certo le etæ:* That the plaintiff and others being ſworn chief pledges, had refuſed to preſent ſuch ſum of ten ſhillings to be paid as aforeſaid; wherefore the ſteward had then fined them in ſix pounds and avowed the taking for the non-preſenting or paying the ſeveral ſums of ten ſhillings and ſix pounds: To which avowry plaintiff demurred. When it was reſolved, 1. That the fine was unlawfully impoſed; for it was impoſed jointly: but it ought to have been aſſeſſed ſeverally; for the offences are diſtinct, one might after payment of his part lie in jail till the whole was paid, which would be unjuſt and ſuch matter being ſhew by plea, ſhould avoid the fine. 2dly, That for this certainty of leet, the lord could not diſtrein of common right; for it is for the private advantage of the lord, and he therefore could not have it *without preſcription*, which he therefore ſhould ſhew.

2. I ſhall now conſider thoſe caſes *in which no replevin can be made*, and ſo no avowry.

"Goo

"*Goods taken beyond ſea*, that is in foreign countries, though "afterwards brought into *England*, cannot be replevied."

* As where goods were ſeized by the *Eaſt-India* Company from interlopers on their trade in *India* within their charter. For the caption might there have been lawful, though not ſo with us, and therefore ſhould not be tried by our laws. * P. 45. Nightingale. v. Adams. 2 Show. 91.

2. Replevin does not lie for the *charters relating to the lands of inheritance*; for they belong to the heir, and therefore are not chattels, and ſo not repleviſeable. Broke tit. Repl. Pl. 34.

3. "*Goods ſeized in conſequence of any judgment or adjudication* of courts, or perſons having juriſdiction, are not repleviſeable.

As if taken under an *execution from the ſuperior courts*, they cannot be replevied, and if attempted to be ſo, the court will commit the offender for a contempt. Win. Forſter. Lutw. 1191.

So where a perſon's goods were ſeized under a *condemnation in the penalty of* 20*l. before a juſtice of peace*, for not entering ſtrong waters, and he replevied them, the juſtice's warrant was held to be a ſufficient juſtification, and to ſupport the ſeizure, which therefore could not be replevied. Aylesbury v. Harvey. 3 Lev. 204.

And where goods had been ſo ſeized under a juſtice's warrant, founded on a *conviction* for deer ſtealing, the court granted an attachment againſt the under-ſheriff, who had granted a replevin for them. Rex v. Monkhouſe. 2 Str. 1184.

* 4. So a replevin does not lie againſt *the king*, nor where the king is party, nor where the taking is in right of the king, for all the king's debts are of record, ſo that the taking for them is as for a judgment. * P. 46. Year Book. 19 H. 7. 1.

5. In general, replevin will not lie without a property in the goods, taken either abſolute or ſpecial; and therefore animals *feræ naturæ*, unleſs reclaimed cannot be replevied. Ante; 2 Roll. Ab. 430.

3. The third proceſs in pleading in this action is the

Replication,

or plea to the avowry.

1. *Diſclaimer* was formerly an uſual replication, in which plaintiff diſavowed the holding of the land from the defendant. But this is now unuſual, for in this caſe the avowry muſt have been on a *certain tenant*, which now not being uſual, ſince the ſtat. *Hen.* 8. allowing an avowry generally on the land, the replication of diſclaimer now ſeldom occurs. Co. Litt. 268.

2. If defendant makes conuſance as bailiff to *J. S.* plaintiff may traverſe the fact that he was bailiff; for though *J. S.* may have a title, yet a ſtranger, who had no authority from him, could have no title, and would be liable, ſo that both parts of defendant's plea muſt be true, and therefore an anſwer to any part is ſufficient. Trevilian v. Pyne. Salk. 107.

3. If

* P. 47. 8 Co. 147. a.

* 3. If defendant juſtifies the taking, plaintiff may reply *a tender* and have judgment. For if a tender was made upon the land before the taking, the diſtreſs is unlawful, and if made after the taking, and before the impounding, the detaining is unlawful.

Cro. Eliz. 813. Co. Litt. 145. Bull. N. P. 60.

And a tender to a ſervant is not ſufficient.

And if defendant avows for rent, plaintiff may plead a tender and refuſal, without bringing the money into court; becauſe if the diſtreſs was not rightfully taken, defendant muſt anſwer in damages.

4. "If defendant juſtifies under a cuſtom, plaintiff cannot reply another cuſtom repugnant to it, without traverſing that ſet out by defendant, but plaintiff may reply ſome qualification of the cuſtom ſet out by defendant, which admits the cuſtom *ſub modo*, without any traverſe."

Kenchin v. Knight. 1 Wilſ. 253.

As where to treſpaſs *quare clauſum fregit*, the defendant pleaded a cuſtom, that all the tenants and occupiers of certain ancient meſſuages had a right of common, and under ſuch cuſtom juſtified the putting in of ſwine. The plaintiff replied, and confeſſed the cuſtom as pleaded to be true, but added, that the cuſtom went further, to wit, that the ſwine *ſhould be rung*, to prevent them from rooting up the ſoil. This replication was held to be good without a traverſe; for the cuſtoms were not different.

* P. 48. Palmer v. Stannage. 1 Lev. 43.

* 5. If defendant avows the taking for rent arrear, it is a bad replication to ſay, that defendant had made a diſtreſs and avowed for rent due at a day later than that for which he then avows, for that is no bar.

§ 3d. The third diviſion of this action is

REPLEVIN CONSIDERED WITH REFERENCE TO THE PERSON.

Co. Litt. 145. b.

1. If the goods of ſeveral perſons are taken, they cannot join in replevin, but each muſt have a ſeveral replevin. For if the caption is unjuſt each has received a ſeparate injury, for which he ought ſingly to complain; but if they joined, each would be complaining of the injury done to the other, which would be abſurd.

Willis v. Fletcher. Cro. Eliz. 530.

Therefore *tenants in common* ſhould not join, but have ſeveral avowries.

* Stedman v. Bates. Salk. 390.

* But *coparceners* ſhould join in an avowry, for they make but one heir.

* 2 Lutw. 1211.

* So alſo ſhould joint-tenants.

† F. N. B. 169. Bourne et ux. v. Mattaire.

† 2. If the cattle of a *feme ſole* be taken, and ſhe afterwards intermarries, *the huſband alone* may have replevin for by the marriage all the perſonal property of the wife becomes abſolutely his. But if the wife joins in the replevin after a verdict, judgment will not be arreſted; for the court will preſume them to be jointly intereſted (as they may

must be if a diſtreſs is taken of goods, of which a man and woman were joint-tenants, who afterwards marry) the avowry admitting the property to be in the manner it is laid. Paſch. 8 Geo. 2. Bull. N. P. 53.

* So where *rent* is due to the huſband and wife, yet may the huſband alone make avowry, but he muſt ſet out the truth of the caſe, that the rent was due to him and his wife, and aver her life, and ſo that the rent is due to him. * P. 49. Wife v. Bellent. Cro. Jac. 442.

3. *Executors* may maintain replevin for the goods of the teſtator, though taken in his life-time, for as the teſtator's property is transferred to the executor, the right muſt be alſo transferred of recovering poſſeſſion of it. Arundel v. Trevil. 1 Sid. 81.

4. If *A.* takes my goods by command of *B.* I may have replevin againſt both; for it being a treſpaſs, both are principals. 2 Roll. Ab. 431.

6. OF THE JUDGMENT, COSTS AND DAMAGES.

1. "If the defendant in replevin has judgment, it is for "a return of the beaſts which had been taken by him, and "reſtored to the plaintiff."

But he can have a return of no more beaſts than he avows for. Sir Henry Snelgar v. Henſton. Cro. Jac. 611.

And 2. By ſtatute 21 *Hen.* 8. *c.* 19. "Every avowant and "other perſon that makes avowry * or conuſance, or juſtifies "as bailiff in replevin, or ſecond deliverance for rents, cuſ- "toms or ſervices, and damage *feaſant*, if the plaintiffs be "barred, ſhall recover damages and coſts." * P. 50.

Though in this ſtatute only rents, cuſtoms, ſervices and damage *feaſant*, are mentioned, yet it ſhall extend to give to the avowant coſts and damages in other caſes not there mentioned, as in avowry for amercements in leets, heriots, ſtrays, &c. if the plaintiff is barred. Haſelop v. Chaplin. Cro. Eliz. 257 & 329.

But where the avowry was for an *amercement in a leet*, and plaintiff was *non-ſuited*, upon which defendant had a return, the court were of opinion that he could not have his coſts and damages, as not being within the ſtatute. Porter v. Gray. Cro. Eliz. 300.

But quære, If there is not a difference in caſe of a trial and verdict and a non-ſuit, otherwiſe theſe two caſes contradict each other.

Neither does it extend to give coſts and damages in an avowry for a *nomine pœnæ*, for it is not mentioned in the ſtatute. And therefore if coſts and damages ſhould in theſe caſes be given, the judgment would be reverſed. Jones 135.

3. By ſtatute 17 *Car.* 2. *c.* 7. it is enacted, "that where- "ver the plaintiff in replevin ſhall be non-ſuited *before iſſue joined* in any court at *Weſtminſter*, that the defendant mak- "ing a ſuggeſtion in the nature of an avowry to aſcertain "to the court the cauſe of the diſtreſs, the court ſhall award "a writ

" a writ of inquiry to the ſheriff of the county where the
" diſtreſs was taken, and the ſheriff having given fifteen
* P. 51. " * days notice to the plaintiff or his attorney, ſhall execute
" ſuch writ of enquiry, by a jury of twelve men, and de-
" fendant ſhall have execution for the ſum found, by *fieri*
" *facias*, or by elegit, in caſe the goods taken amount no
" to it, and the coſts of ſuit."

Under this ſtatute it has been reſolved

Waterman v. Yea. 2 Wilſ. 41. 1. That if the plaintiff becomes non-ſuit, that defendant is not bound to take his remedy under the ſtatute; for he may have his option either to proceed by writ of enquiry under it, or *bring his action againſt the plaintiff, and his ſureties on the replevin bond.*

Cooper v. Sherbrook. 2 Wilſ. 116. Anon. Latch. 72. 2. But if defendant does proceed under the ſtatute, by ſuing out a writ of inquiry, and alſo *a retorno habendo*, a writ of ſecond deliverance ſhall be a ſuperſedeas to the writ of *retorno habendo*, but not to the writ of inquiry; ſo that plaintiff ſhall have his cattle, and defendant his arrears, coſts and damages, by virtue of the proceedings under the ſtatute.

Pratt v. Ratledge. Salk. 95. Baker v. Lade. 2 Carth. 253. For the damages are not for the things avowed for, but are given by ſtatute 21 *Hen.* 8. *c.* 19. as a compenſation for the expence and trouble the avowant has undergone. And therefore though the writ of ſecond deliverance ſuperſedes the effect of defendant's judgment or non-ſuit, *viz.* a return of the goods, yet the damages ſtill continue. *Sed quære*, under the writ of inquiry the defendant ſhall not recover the rent avowed for, beſides his coſts and damages.

* P. 52. 2 Wilſ. 117. per *Bathurſt* juſtice, in * *Cooper* v. *Sherbrook ante*, by ſtatute *Car.* 2. the legiſlature intended that the proceedings under the ſtatute by writ of inquiry, *fieri facias*, and *elegit*, ſhould be final for the avowant to recover his damages, and that the plaintiff was to keep his cattle, notwithſtanding the courſe of awarding a *retorno habendo*, which is a right judgment (and ſtill is entered up as before the ſtatute); for the ſtatute hath not altered the judgment at common law, but only gives a further remedy to the avowant.

Bull. N. P. 58. 2. By the ſame ſtatute 17 *Car.* 2. *c.* 7. it is further enacted, " That if the plaintiff be non-ſuited *after avowry*,
" have a verdict againſt him, that the jury that try the
" ſhall inquire of the ſum in arrear, and alſo of the
" of the goods, *&c.* taken, and the defendant ſhall
" judgment by *fieri facias* and *elegit*, as before."

3. " And if upon demurrer, defendant has judgment
" writ of enquiry ſhall go in like manner."

Cheap v. Culpepper. 1 Lev. 255. 1 Vent. 40. S. C. Under this ſtatute it has been reſolved, that if the plaintiff is nonſuited after avowry, the jury who try the cauſe can aſſeſs the arrears, damages, *&c.* and that if they do it, it cannot be ſupplied by a writ of inquiry, for the ſtatute expreſsly confines the inquiry of the rent in arrear, damages, *&c. to the jury impannelled to try the cauſe.*

And therefore in case of such omission the defendant must take his judgment, & *retorno habendo* at common law. Tucker v. Stevens. Pasch. 6. Geo. 1. C. B. Bull. N. P.

* "But this is confined to cases within the statute, as *rents*." * P. 53.

For in this case where defendant avowed the taking as a distress for *poors rates*, and the jury omitted to inquire of the damages, the court granted a writ of inquiry to supply the defect. Dewell v. Marshall. 3 Wilf. 442.

† And in general in the case of *Valentine* v. *Faucet*, 2 *Stra.* 920. 20. & Cas. Temp. *Hardwicke*, 138, lord *Hardwicke* laid it down, that in every case, unless where the court is tied up by stat. 17 *Car.* 2. which respects only rent arrear, a writ of inquiry may be granted in order to do complete justice. Herbert v. Waters. Salk. 205. S. P. † Per Gould Justice. 2 Blackst. Rep. 921.

Therefore it was so held in the case of poors rates.

So where the defendant avowed for a taking for *damage feasant*, and was non suited, it was held that a writ of inquiry should be granted. Humfrey v. Misdale. Comb. 11.

And note, That in writs of inquiry the jury set their hands and seals to their verdict, and upon the trial of such writs, the judge of *nisi prius* is only assistant to the sheriff, and has no judicial power; and if the parties come to any agreement at the trial, the way is to bring it to the judge to sign, and afterwards move to have it made a rule of court. Per Cur. Cas. K. B. 519. 610.

* "The cases of non-suit after avowry, mentioned in the statute, apply only to cases of *non-suit at the trial*." * P. 54.

For as in replevin both plaintiff and defendant are actors, either may carry down the cause to trial; and therefore defendant *cannot move to have judgment, as in case of a non pros for not proceeding to trial*; for he might have given notice himself, in which case, if he had not gone on to trial, he would have had costs against him; but if plaintiff had given notice of trial, it seems that he should pay costs. Eggleton v. Smart. 2 Black. Rep. 375.

4. Where there are several defendants, and one of them pleads *non cepit*, and is acquitted, in which case, under stat. 9 *W.* 3. *c.* 11. *in actions of trespass*, he would be intitled to his costs against the plaintiff, if there was no certificate from the judge, "that there was good ground for making him a defendant;" yet in the case of *replevin* the defendant acquitted cannot have his costs, for replevin is not within the statute; for it is not mentioned, and statutes giving costs are to be construed strictly. Ingle v. Wordsworth. 3 Burr. 1284.

Before I conclude this chapter, it may be proper to take notice of some points which occur in this action.

1. Where the goods distrained have been eloign'd, so that the sheriff cannot get at them to make replevin, in such case, the sheriff may bring this action in the detinet, and after avowry pray that defendant may gage deliverance. Bull. N. P. 52.

Or * P. 55.

De la Baſtile v. Reignald. Caſ. K. B. 37. & 425.

Or he may, upon a return of an elongavit to the pluries writ of replevin, have a writ to the ſheriff, commanding him to take other beaſts of the defendant in withernam; but if the defendant, before the return of the withernam, appears to the writ of replevin, and offers to plead *non cepit*, it ſhall ſtay the withernam; for the defendant ſhall not be concluded by the return of an elongavit; for the ſheriff can make no other return, where he cannot find the things to be replevied.

2. Where defendant has had judgment of *retorno habend* and the plaintiff again makes replevin, he does it by writ of ſecond deliverance, which writ is given by ſtat. *Weſt.* 2 13 *Ed.* 1. *c.* 2. under which writ the right again may be tried; but the ſtatute further enacts, "That if the part "replevying again makes default, or for any other cauſe "a return of the diſtreſs, now twice replevied, be awarded "the diſtreſs ſhall remain irrepleviſable."

* P. 56.

* CHAPTER VII.

THE ACTION OF TRESPASS

1. TRESPASS, in the moſt extenſive ſenſe, means an injury ariſing to another perſon or property, from the mi feaſance or act of another; and therefore, all ſuch injuries though they aſſume different names, in fact are actions treſpaſs; as aſſault and battery is a treſpaſs to the perſon, &

The treſpaſs which I ſhall here conſider is the action pr perly ſo called, and includes only *injuries to the lands or pe ſonal property of another.*

In treating of this action I ſhall conſider, 1. The natu of the action in general; 2. With reference to things which it is committed; 3. With reference to the perſon, v as committed by officers, or by private perſons; 3. F what treſpaſs will not lie; 4. Who may maintain this a tion; 5. The pleadings; 6. The verdict, judgment, a coſts.

1. OF THE NATURE OF THIS ACTION I GENERAL.

3 Black. Com. 209.

1. "Every entry upon the land of another, is ſtrict "an injury, if done without the owner's conſent, a "

"* at leaſt does the miſchief complained of in the writ, that * P. 57.
"of treading and beating down plaintiff's graſs; for ſuch
"injuries therefore this action lies."

But, however, in certain caſes, the law has given a right Ibid.
to enter upon the lands of another: As if a man comes to
execute legal proceſs: to demand money: a landlord to
diſtrein: a reverſioner to ſee that no waſte has been done: a
traveller to get refreſhment at an inn: All theſe are caſes in
which the law allows an entry, and ſo the entry is not a
treſpaſs.

So if a man makes a leaſe, excepting the trees, and he Lifford's
enters to ſhew them to a purchaſer, he is not a treſpaſſer. Caſe.

2. "But where the law allows ſuch entry, or any act to 10 Co. 46.
"be done, if the perſon miſdemeans himſelf, or makes an Six Car-
"unlawful uſe of the authority ſo given, he ſhall be held penter's
"to be a treſpaſſer *ab initio*: For from the ſubſequent act Caſe.
"the law judges, *quo animo* the firſt entry was made." 8 Co. 146.

As if a perſon enters into a tavern, which every man by Ibid.
law has a right to do; yet if he *ſteals any thing* from thence,
his firſt entry ſhall be deem'd unlawful, and him a treſpaſſer
ab initio.

So where to treſpaſs for taking a gelding, defendant Bagſhaw v.
pleaded that he took him as an eſtray, and ſo juſtified. Spencer.
Plaintiff replied, that * after the taking, *he had labour'd and* * P. 58.
work'd him. On demurrer, it was objected, that the firſt Cro. Jac.
taking being lawful, that the action ſhould be *caſe* for the 147.
ſubſequent abuſe; but it was reſolved, that the ſubſequent Oxley v.
abuſe of the eſtray being unlawful, made defendant a treſ- Watts.
paſſer *ab initio*. Mich. 26 G.
3. S. P.

And therefore, where plaintiff brought treſpaſs for break- Lynne v.
ing and entering his houſe, and *taking an exceſſive diſtreſs*, Moody.
it was adjudged, that this action would not lie, for the *tak-* 2 Stra. 851.
ing was lawful, and no ſubſequent abuſe appeared to make
defendant a treſpaſſer *ab initio*.

As the moſt frequent caſes which occurred under this
head, happened, where goods or cattle had been taken law-
fully for a diſtreſs, but from ſome ſubſequent abuſe or miſ-
management, the party was, according to the doctrine now
delivered, made a treſpaſſer *ab initio*, when in fact the firſt
taking was lawful; This hardſhip was remedied by ſtatute
11 Geo. 2. c. 19. which enacts, "That a diſtreſs for rent ſhall
not be deemed irregular, nor the party be deem'd a treſ-
paſſor *ab initio* for any irregularity in the ſubſequent diſ-
poſition of it: But the party aggrieved may recover full
ſatisfaction for the ſpecial damage he ſhall have ſuſtained
thereby, and no more, in an action of treſpaſs or on the
caſe, unleſs tender of amends has been made before."

This

This ſtatute therefore only affects *the ſubſequent diſpoſal of the diſtreſs*: So that it ſeems * that this action ſtill lies for an *unlawful taking*; as if the diſtreſs has been made at night: So if of beaſts of the plough, when other ſufficient diſtreſs can be had: So if doors have been broken open to make it; for the outer door can in no caſe be broke open except under the direction of ſtat. 11 *Geo.* 2. *c.* 19. which impowers the party to do it "in the preſence of a conſtable "or peace-officer, oath being made before a juſtice, of "there being good grounds to ſuſpect that the goods in "tended to be diſtrained, have been conveyed away, and "are contained in ſuch houſe."

* P. 59.

Co. Litt. 161.

But in caſe of a diſtreſs for rent, if the outer door is open, the perſon diſtraining may juſtify breaking open an inner door or lock to find any goods which are diſtreinable.

Browning v. Dann. 9 G. 2. Bull. N. P. 82.

That ſtatute applies to caſes where the diſtreſs is for rent but a ſimilar proviſion has been made in other caſes. As by ſtat. 17 *Geo.* 2. *c.* 38. it is enacted, "That where any diſtreſs "is made for money juſtly due for relief of the poor, that "it ſhall not be deemed unlawful, nor the party making "a treſpaſſor, on account of any defect or want of form in "the warrant of appointment of overſeers; or in the rate "or aſſeſſments; or in the warrant of diſtreſs thereupon. "Nor ſhall the party be deem'd a treſpaſſor *ab initio*, on ac-"count of any irregularity, which ſhall be afterwards done "by him; but the party grieved may * recover for the ſpe-"cial damage, unleſs tender of amends has before been "made."

Caſ. temp. Hard. 168.

* P. 60.

And a warrant may be made to diſtrein before the time for which the rate is expired, and is good.

Charlwood v. Beſt. Weſtm. 1748.

* But though treſpaſs may lie for taking beaſts of the plough, as a diſtreſs for rent, where other beaſts may be had; yet in the caſe of diſtreſs for *poors rates*, it is lawful to take them, though other diſtreſs may be had: For it is not properly a common law diſtreſs, but is rather in the nature of an *execution*, in which caſe there is no ſuch exemption.

Bull. N. P. 82. * Hutchings v. Chambers. 1 Burr. 579.

3. "Treſpaſs muſt always ſuppoſe a *miſfeaſance*; for it "will not lie for a bare non-feaſance, which as it ſuppoſes "no act, carries no treſpaſs."

As if a perſon enters a tavern, if he ſteals any thing, he is a treſpaſſer *ab initio* for the miſfeaſance; but for not pay-ing for the wine he has had, no action lies.

Six Carpenter's Caſe. 8 Co. 146.

4. "To conſtitute a treſpaſs, the act cauſing the injury "muſt be *voluntary*, and *with ſome degree of fault*; for "done involuntarily and without fault, no action lies."

4 Bur. 2092.

As here, in treſpaſs for chaſing plaintiff's ſheep, the caſe was, that plaintiff's ſheep being treſpaſſing on defendant's ground, defendant chaſed them off with a dog, which

Mitton v. Faudrye. Poph. 161.

that followed them into plaintiff's own ground, * for which the action was brought and held not to lie; for the defendant might justify chasing the sheep off his own ground, and as the dog could not be suddenly called in, the trespass and injury was involuntary, it appearing that defendant had called the dog in when off his ground. * P. 61.

But where defendants were out with dogs and guns, and coming on plaintiff's ground adjoining to his paddock, one of their dogs killed one of plaintiff's deer, it appearing that they were not in any pathway or road, the injury proceeded from some small fault, and could not be said to be an accidental and involuntary trespass, so plaintiff had judgment. Beckwith v. Shordike & Hatch. 4 Burr. 2092.

"And on the same foundation, though the injury has proceeded *from mistake*, this action lies; for there is some fault from the neglect and want of proper care."

As where the trespass laid, was for cutting plaintiff's grass, and carrying it away: Defendant pleaded that his land adjoin'd that of the plaintiff, and that *by mistake* in cutting his own grass, he had cut part of the plaintiff's, which was the trespass, &c. and tendered amends. Plaintiff demurred, and had judgment; for it appear'd, that the fact was voluntary, and through some degree of fault, and his intention and knowledge are not traversable. Basely v. Clarkson. 3 Lev. 37.

3. These are the *general grounds* of this action, the more particular cases in which it is * maintainable, are now to be considered, 1. With reference to the things on which the action may be committed; 2. To the person. * P. 62.

OF TRESPASS, WITH REFERENCE TO THE THINGS FOR WHICH IT LIES.

1. If there is lessee for life or years of lands, lessee has no property in the trees growing on the land, and even if the clause in the lease is without impeachment of waste, it gives a property, but is merely an exemption from an action. But if a stranger cuts any down, lessee may maintain trespass, but he shall not recover damages for the *value of the trees*, because the property of them is in him in reversion, but the damages shall be for *cropping and breaking his close*, and *perhaps for the loss of shade*, &c. Herlakenden's Case. 4 Co. 62. a.

So by common law, though tenant for life or years is intitled to house-bote, hedge-bote, &c. yet a *copyholder* is not; and if he takes trees for that purpose, he is a trespasser: but he may have such right by custom of the manor. Ld. Montague. v. Shepherd. Cro. Eliz. 5.

2. Another case in which *tenants for life, years, or at will,* are liable to, or may have an action of trespass, is in the case of the emblements or crop growing on the lands, on the determination of their estates.

"As

" As to which it is a general rule, that where the eſtate
" is of an uncertain duration, that there the tenant ſhall be
" intitled to the emblements."

* P. 63. Co. Litt. 55. * Therefore, if a man is *tenant for life*, and ſows the land, but dies before harveſt, his executors ſhall have the crop. So if a man is tenant *pur auter vie*, and *ceſtui que vie* dies. The land being ſown, the tenant *pur auter vie* ſhall have the emblements on the ſame principle, as being the act of God.

5 Co. 116. b. So where the eſtate is determined by act of law, it is the ſame: as if a leaſe be made to a man and his wife *during coverture*, and the huſband ſows the land, and afterwards the marriage is diſſolved, the huſband ſhall have the emblements; for the ſentence was *in invitum*, and the act of law.

Ibid. " But where the eſtate for life is determined by the act of
" the leſſee himſelf, there he ſhall not have the emblements."

Oland's Caſe. 3 Co. 116. a. As, where a woman tenant *durante viduitate* ſows the land, and afterwards takes huſband, whereby her eſtate is determined by her own act, the leſſor ſhall have the emblements. So if the leaſe is till leſſee commits waſte, if he ſows the land and commits waſte, he ſhall not have the emblements; for the determination of the eſtate was by his own act.

Cro. Eliz. 461. But the *leſſee of tenant for life* who determines his eſtate by his own act, ſhall not loſe the emblements, though leſſor would.

Per Poph. Cro. Eliz. 461. The caſe is the ſame of *leaſes at will*; for if leſſee at will ſows the land, if the leſſor determines his will, leſſee ſhall have the emblements; but if leſſee at will himſelf * determine

* P. 64. it, he ſhall not have them, for it was his own act.

Co. Litt. 556. 5 Co. 116. b. So if a man makes a leaſe at will, and the leſſor is outlawed, by which his eſtate is determined, yet ſhall leſſee have the emblements; but if leſſee himſelf had been outlawed by which his will is determined, the King ſhall have the emblements.

Litt. § 68. " But where the eſtate is of certain duration, as a lea
" for years, if leſſee in ſuch caſe ſows the land, and h
" term is ended before the corn is ripe, in ſuch caſe the le
" ſor, or he in reverſion, ſhall have the crop, and not t
" tenant."

But though this rule is general, yet it admits of certa exceptions ariſing from the *cuſtom* of the country.

Wiggleſworth v. Dalliſon. Dougl. 190. As where defendant, to an action of treſpaſs for mowi and taking away a crop of corn, pleaded a cuſtom, th
" *tenant for any term of years which expired on the 1ſt of* Ma
" might, *after the expiration of his term, take and carry awa*
" *as his waygoing crop, all the corn then growing on the land*
" *the time the term expired.*" This cuſtom was adjudged be good and reaſonable, though contended that leſſee cou not claim it againſt his deed.

"

" In theſe caſes, therefore, where either party is intitled " to the emblements, he may have treſpaſs for taking them " and carrying them away."

* 2. This action lies for injuries occaſioned by things. * P. 65.

Damage Feaſant.

" For where an injury has been done by the cattle or " goods of any one to the lands of another, he who re- " ceives the injury may *either diſtrein them damage feaſant*, " *or bring his action of treſpaſs, quare clauſum fregit*, and re- " cover for the damage ſuſtained."

" But he ſhould make his election of his remedy; for if " he diſtreins, and the diſtreſs eſcapes, the action of treſpaſs " is gone, unleſs the eſcape was not through his fault or " neglect."

For where plaintiff declared in treſpaſs *quare clauſum fregit*, defendant pleaded, that the plaintiff had *diſtreined* his hog damage feaſant, which, was the ſame treſpaſs, plaintiff replied, that the hog eſcaped without his conſent, and that he was yet unſatisfied of the damage. Defendant demurred, and had judgment; as it did not appear that it was without his fault, as he had only pleaded that it was *without his conſent*. Vaſper v. Eddowes. Salk. 248.

But if the diſtreſs *dies* in the pound, the action of treſpaſs is reſtored; for ſuch is the act of God, which ſhall not deprive the party of his remedy. Ibid.

* " And he who has the care, cuſtody, or poſſeſſion of the " cattle who do the damage, is liable to this action." * P. 66.

As if agiſted cattle break into another's land, the agiſter is liable to the damages: So if the hogs of *A.* were put into the yard of *B.* and they break into *C.*'s land, action lies againſt *B.* even though *A.*'s ſervant watched them, and ſo the owner had a ſpecial poſſeſſion. Dawtry v. Huggins. Clayt. 33. Tri. p. Pals 201.

3. Another ſpecial caſe of treſpaſs is that of

Injuries to the Fiſhery of another.

As to this it has been decided,

1. A man may have a proper and ſeveral intereſt, as well in a fiſhery as in water, or a river: for a man may grant *quam ſuam*, and the fiſhery ſhall paſs. Caſe of the Royal fiſhery of the river Bann in Ireland. Dav. Rep. 149.

2. The ſea belongeth to the King, and alſo every navigable river, ſo high as the ſea ebbs and flows, is a royal river; for ſo far 'tis conſidered as a branch of the ſea, and belonging to the crown: But rivers not navigable are the property of the proprietors of the land on both ſides the river; that is, if both ſides belong to one owner, the whole river is his, if to two perſons, the river is in moieties. But in the caſe of the crown, there is a difference in reſpect to granting the land, from that of a ſubject; for by a grant of the land in the caſe of a ſubject, the fiſhery would paſs; but in the caſe of the crown, by a grant of the land adjoining a navigable

* P. 67. * river, or royal fiſhery, the fiſhery would not paſs, for it is an inheritance in groſs in the crown and parcel of the inheritance of the crown itſelf, but it may be ſpecially granten *by grant of the fiſhery* from the crown.

Same caſe. Upon theſe grounds the ſeveral diſtinctions of the rights of fiſhery are formed, viz. free fiſhery, ſeveral fiſhery, and common of fiſhery.

1. As to a free fiſhery, it is the excluſive right of fiſhing in a navigable river, or arm of the ſea; and this muſt be claimed by preſcription or grant from the crown. For,

S. C. and Warren v. Matthews. Salk. 137. 2 Black. Com. 139. The right of fiſhing in navigable rivers is common to all the king's ſubjects, and therefore an excluſive right muſt be derived from the grant of the crown, in whom that excluſive right originally reſided. But the preſcription ſhould be as old as the reign of *Henry* II. for the charters of king *John* and *Henry* 3 avoid all ſuch grants from the beginning of the reign of *Richard* the 1ſt, and prohibit the fencing of rivers in future. So that no grant of a free fiſhery ſhall be good, if made ſince that time.

2 Black. Com. 139. 2. This is alſo the ſame of a *ſeveral fiſhery*, which is alſo an excluſive right derived in the ſame manner, but with this additional circumſtance, that it ſhould be claimed by a perſon who owns the ſoil, as the land adjoining to a navigable

Carter v. Murcot. 4 Burr. 2162. river; and it was accordingly held to be good, where the plaintiff in this caſe claimed a ſeveral fiſhery in the river Severn, where it was * navigable, as part of his manor of Allingham, which adjoined the river, and recovered accordingly.

* P. 68

Per Ld. Mansfield. 5 Burr. 2817. "But it is not neceſſary to conſtitute *a ſeveral fiſhery*, that "*all other perſons ſhould be excluded:* It is ſufficient that "perſon ſhall have a *co-extenſive right*; for a partial right "as to take for a particular purpoſe, does not deſtroy the "nature of a ſeveral fiſhery."

Seymour v. Ld. Courtney. 5 Burr. 2814. As where plaintiff was grantee of a ſeveral fiſhery, but the grantor had reſerved to himſelf the oyſters and fiſh for his own table, and having declared as poſſeſſed of a *ſeveral fiſhery*, the judge non-ſuited him, deeming the right reſerved to the grantor, as deſtroying the nature of a ſeveral fiſhery which he ſuppoſed ſhould be *excluſive* of all others. But the Court of *King's-Bench* ſet aſide the non-ſuit, holding the doctrine as before delivered by lord *Mansfield*.

Warren v. Matthew. Salk. 137. Anon. 1 Mod. 105. But where a man claims ſuch free or ſeveral fiſhery, he muſt ſhew his title, and the *onus* lies on him; for the claim is derogatory to the common right of the ſubject.

*And he who has either of theſe ſpecies of fiſhery may have treſpaſs for taking the fiſh, for he has a property in them.

* Smith v. Kemp. Salk. 637. 3. Common of *Piſcary*, is a right of fiſhing in the water of another, in common with others; and it differs from a ſeveral fiſhery, that in this laſt the owner has a property

the fish before they are caught, but in the case of common of *Piscary* not till they are taken. * P. 69.

4. Another special action of trespass is that to try the right to

Tolls or Customs.

The person whose goods have been so distrained for payment, bringing this action for the taking, in which the right to the tolls is tried. But the cases under this head have already been treated of in the action of *replevin.*

So for an amercement in a court leet.

5. Another special action of trespass is that committed in the case of

Markets and Fairs.

1st. Every one of common right has a liberty of coming to buy and sell, without paying any toll, &c. unless due by custom or prescription. But if a person requires any particular easement, as a stall, he must have the licence of the owner of the soil. For the property of the soil still remains in the owner of the land, and he dedicates it no farther to the use of the public, than the right of entry to buy and sell. This right, therefore, of erecting a stall for exposing things to sale in a market or fair, is called stallage, and is a sum which the owner of the soil has a right to for his permission. If the ground is broken it is called picage. Mayor of Northampton v. Ward. 1 Wilf. 107. 2 Stra. 1239. * P. 70.

If any person therefore comes into a market and raises a stall without the owners of the soils leave first obtained, this action lies against him, for he is thereby a trespasser. Ibid.

And it should seem that trespass is the only action; for it is said (*Stra.* 1238) that debt or assumpsit would not lie for the sum due, and it is decided in this case, that goods brought to a market cannot be distreined damage feasant. Mayor of Launceston. Case Cro. Eliz. 75. & Cro. Eliz. 628. S. P.

2. So this action lies for erecting *tables*, upon which wares are exposed to sale; for it is an use of the soil which belongs to the owner, and similar to stalls in the use made of them. Mayor of Norwich v. Swann. 2 Black Rep. 1116.

6th. Many cases of trespass occur on questions of injuries to land by

Hunting, or the Pursuit of Game, &c.

As to which questions these decisions have taken place:

1st. Any person may *justify going* upon the lands of another *in pursuit of ravenous beasts*, as foxes, badgers, &c. but he will *not justify a person to break the ground or dig* for them. For the taking of them is of public benefit. Gaush v Mynns. Cro. Jac. 321.

* P. 71. Gundry v. Feltham. Trin. 26 Geo. 3. Term. Rep. 334.

* So it will not justify any *excessive or unreasonable damage to the land of another*, for the justification is only as to the *following*, and should be done with as little damage as possible. And therefore if to trespass for such cause, defendant justifies as following a fox or such beast, and in fact has committed unnecessary mischief, plaintiff should make a new assignment of the excessive and unnecessary injury.

2. By statute 22 & 23 *Car.* 2. *c.* 26. gamekeepers, properly nominated, or other persons (authorised by warrant from a justice of peace) may search for and seize instruments for destruction of the game.

Carpenter v. Adams. Comb. 183.

1. Gamekeepers in making a search should have a justice's warrant, founded on an information.

Rogers v. Carter. 2 Wilf. 387.

2. A gamekeeper, properly appointed, has a right *to keep and carry a gun or other instrument to take game any where*, but a right *to kill only on his own manor*. Therefore where plaintiff, who was a gamekeeper, had followed game off his own manor, and defendant took his gun from him, trespass was held well to lie, for he was entitled by law to keep it, though he had been liable to the penalty for killing game off the manor.

3. By stat. 9 *Ann. c.* 25. a lord of a manor shall appoint but one gamekeeper, and by stat. 3 *Geo.* 1. *c.* 11. the person so appointed should be either a person qualified himself; or
* P. 72. a menial servant of the lord, or appointed and * employed to kill game for the sole use of the lord.

Per Cur. 3 Wilf. 389.

This clause does not prevent the lord of a manor from appointing any person as his gamekeeper, though neither qualified, nor a menial servant. For the statute never meant to take from lords of manors, living at a distance, the power of appointing a person to kill game for their use.

Sir John Lade v. Shepherd. 2 Stra. 1004.

7th. By setting out an *highway*, the owner does not part with the property of the soil. And therefore where defendant owned land adjoining to the highway, which was the soil of the plaintiff, but separated by a ditch, and he laid a bridge over the ditch to the highway; it was held that plaintiff might have trespass; for the soil was appropriated only to the purpose of an highway.

3d. OF TRESPASS WITH REFERENCE TO THE PERSONS.

That is 1st, as committed by *officers*, or persons entrusted with some authority by law. 2dly, *By private persons.*

1st. As to *officers*, as for *illegal executions.*

Terry v. Huntinton. Hard. 480. Case of the Marshalsea. 20 Co. 76. a. b.

1. Where the *subject matter of any suit is not within the jurisdiction of the court* applied to for redress, every thing done is absolutely void, and the *officer* executing the proces

* is a *treſpaſſer*. But where the ſubject matter is within the jurisdiction of the court, but the *want of juriſdiction is to the perſon or place*, unleſs the want of juriſdiction appears on the proceſs to *the officer who executes it, he is not a treſpaſſer*. * P. 73.

But in the caſe of conſtables, a particular exemption is given by ſtat. 24 *Geo.* 2. *c.* 44. which enacts, "that no conſtable ſhall be anſwerable for obeying a juſtice's warrant, notwithſtanding any defect of juriſdiction in the juſtice who iſſued it."

2. *If judgment is vacated* as unduly obtained, and reſtitution awarded. (As where the writ of execution was made returnable on the eſſoign day, the ſuit being by bill, the execution was ſet aſide, and the goods ordered to be reſtored.) Defendant in the firſt action may bring treſpaſs againſt the plaintiff, for taking the goods; for by vacating the judgment, it is as if it had never been, but it is otherwiſe *of a judgment reverſed for error*, for then no action lies, for it is the fault of the court, but an irregular judgment is the fault of the plaintiff, or his attorney. But in ſuch caſe of an irregular judgment no action lies againſt the officer, for he is juſtified by the writ. Turner v. Felgate. 1 Lev. 95. 1 Sid. 272. Adams v. Sparry. 1 Wilſ. 155.

So that the rule as to juſtification under proceſs of any court is, that if the court has juriſdiction, but their *proceedings are irregular*; treſpaſs lies againſt the plaintiff in the action for taking the goods, but not againſt the officer. 2 Wilſ. 384.

* But if the court has not juriſdiction, the officer is liable. * P. 74.

3. If a *fieri facias* is directed to the ſheriff to take the goods of a perſon in execution, and he directs his warrant to his bailiffs for that purpoſe, *if they take the goods of another perſon* by miſtake, treſpaſs lies *againſt the ſheriff*, for he is liable for the acts of his officers acting under colour of his authority. Sanderſon v. Baker and Martin. 2 Black. Rep. 832. 3 Wilſ. 309.

As it therefore often happens that the goods of a perſon againſt whom a *fieri facias* is expected are conveyed away, or transferred by bill of ſale; how far the property remains in ſuch caſe, is ſettled by the *Statute of Frauds*. S. C. Ackworth. v. Kemp. Dougl. 41.

For by the common law the goods of the defendant were bound from the teſte of the writ, and therefore if defendant had aliened his goods, after or on the day of the teſte of the writ of execution, the ſheriff might take the goods in the hands of a purchaſer. It was therefore enacted, "That the goods ſhould not be bound from the teſte, but from the delivery of the writ to the ſheriff, who is to indorſe, on receipt of it, the day and month on which he received it." S. P. Cro. Eliz. 174. Id. 440.

1. This ſtatute relates only to protect the goods in the hands of *purchaſers*; that is, to caſes where the goods are *bona fide*, for if the party dies after the teſte, but before the delivery of the writ to the ſheriff, the goods are bound in the hands of his *executors*. Comb. 145. Anon. 2 Vent. 218. S. P.

2. So

* P. 75. Per Ld. Holt. Ld. Raym. 252.

* 2. So if a writ of execution is delivered to the ſheriff and the defendant becomes a bankrupt before it is executed, the execution is thereby ſuperſeded, and the goods not bound by the delivery,

"But in ſuch caſe the ſheriff ſhall not be made a treſ-"paſſer, by relation, for any ſubſequent diſpoſal of them. "Though he would be ſubject to an action of trover."

Smith v. Milles. Mich. 27 G. 3. B. R. Term. Rep.

For where the goods were taken in execution, after an act of bankruptcy committed, by the defendant who was ſheriff, but before the ſale the commiſſion was ſued out, and a proviſional aſſignment made, of which he had notice, but ſold the goods. This action was held not to lie.

3. So the ſtatute extends not to bind the *king*, for he is not named; and by ſtatute 33 *H.* 8 *c.* 39. If the king and a ſubject have both actions againſt the ſame perſon, the king's execution ſhall have place, provided his ſuit was commenced at any time *preceding the judgment* given for the other perſon, and therefore the goods are liable in ſuch caſe, in whoſe hands ſoever they be.

Per Hardwick Ch. 2 Eq. Caſ. Ab. 381.

4. Neither before the ſtatute of frauds, nor ſince, is the property of the goods altered, but continues in the defendant, *till execution executed:* And the meaning of theſe words, "that the goods ſhall be bound from the delivery of "the writ to the ſheriff," is, that after the writ is ſo delivered, if defendant makes * any aſſignment of his goods *except in market overt*, the ſheriff may take them in execution.

* P. 76.

Reed v. Harriſon. 2 Black. Rep. 1218.

4. But though poſſeſſion be regularly taken of goods, yet the officer muſt remove them to a place of ſafe cuſtody, in a proper time: for where he kept poſſeſſion of them on the premiſes, under an attachment from an inferior court, for an unreaſonable length of time, viz. ſix months. He was held to be a treſpaſſer *ab initio*.

Semayne's caſe. 5 Co. 91.

5. It is not lawful for the ſheriff, or his officers, *to break the houſe* of any perſon to execute proceſs of *fi. fa.* againſt the goods, or *capias* againſt the perſon, at the ſuit of a ſubject, and if the ſheriff or his officers do ſo, he is a treſpaſſer and liable in this action.

S. C.

But this privilege is only confined to the perſon or goods of the *owner of the houſe*, or ſuch as are brought there, without fraud or *covin*, and therefore ſhall not protect the perſon or goods of any other which are brought there to prevent lawful execution, and therefore in ſuch caſe *after denial, and requeſt the* ſheriff may break doors to do the execution. But in ſuch caſe a demand of the delivery of the goods is neceſſary, for if he breaks the houſe without making ſuch demand, he is a treſpaſſer.

Day v. Biſhbitch. Cro. Eliz. 374.

6. Things fixed to the freehold cannot be taken in execution, and therefore for ſuch taking, treſpaſs will lie.

* P. 77. Bull. N. P. 91.

* 7. A *fieri facias* is *de bonis & catallis debitoris*, and therefore under it, the *debtor's goods only* can be taken in execu-

ti

tion. But a *levari facias* is *de exitibus terræ*, and therefore under it the ſheriff may take the cattle of a ſtranger *levant* and *couchant*, for they are the iſſues of the land, (*St. Weſt.* 2. *c.* 32. 2 *Inſt.* 433.) and the land is debtor. And ſuch is the caſe of tenants in common or commoners; for their cattle may be taken on the land, unleſs their title be found by inquiſition, or till avoided by *monſtrans de droit*. The law in this caſe is the ſame, as if the taking was under an outlawry. Britton v. Cole. Salk. 395.

8. There is a difference to be obſerved where the action is againſt the ſheriff or his officer, when the action is by the *defendant in the original action*, whoſe goods have been taken, and when by *a ſtranger*.

For where the action is *by a ſtranger*, whoſe goods have been wrongfully taken by the ſheriff, under a *fieri facias* or other execution iſſued againſt another perſon, the ſheriff or his officers in juſtifying under the writ *is obliged to produce or prove a copy of the judgment* upon which the *fieri facias* iſſued. Martyn v. Podger & al. 5 Burr. 2631.

But if the action is *by the perſon againſt whom the fieri facias iſſued*, the judgment need not be produced in evidence. Lake v. Billers. 1 L. Raym. 733.

2. *Juſtices of Peace*

Are alſo ſubject to this action, if by any illegal proceeding they take the goods of any perſon. But as to theſe, it is enacted by ſtat. 27 *G.* 2. *c.* 20. "That in all * caſes where a juſtice of peace is impowered by any act of parliament made or to be made, to iſſue a warrant of diſtreſs, it ſhall be lawful for him in ſuch warrant to order the goods diſtrained to be ſold within a certain time limited by ſuch warrant, ſo that it be not leſs than four nor more than eight days, unleſs the money for which the diſtreſs was made, and all charges be ſooner paid." * P. 78.

And note, that a warrant *ex vi termini* only means an authority; therefore if under the hand of a juſtice it is ſufficient, without being under ſeal, unleſs particularly required by act of parliament. Padfield v. Cabball. Tr. 16, 17 C. 2. C. B. Bull. N. P. 83.

3. The third caſe of actions againſt officers, are thoſe grounded on the revenue laws, and are againſt

Officers of the Exciſe or Cuſtoms.

1. By ſtatute 13 & 14 *Car.* 2. *c.* 11. § 5. "Any perſon authorized by writ of *aſſiſtance* out of the court of *Exchequer*, may (taking a conſtable or other officer with him) *in the day-time* enter any houſe or place, and in caſe of reſiſtance, break open doors, cheſts, or packages, and ſeize any uncuſtomed goods he ſhall find there."

Treſpaſs lies againſt *cuſtom-houſe officers* for entering the houſe of any perſon to ſearch for ſmuggled goods, *if none were found*, for the officer does it at his peril. 2. Though the * officers had a writ of aſſiſtance, yet if *they had no conſtable with* them, they are treſpaſſers even if ſmuggled goods had been found. 3. And though they had with them a conſtable, * P. 79. Bruce v. Rawlins. 3 Wilſ. 61. Redſhaw v. Brook. 2 Wilſ. 405. S. P.

conſtable, yet *if he was not conſtable of the place where the ſearch was made*, they are treſpaſſers.

2. In ſearches by *exciſe officers* for goods which have not paid the duty, *by night*, the preſence of a conſtable or peace officer is required by ſtat. 8 *Ann. c.* 9. and ſtat. 10 *Ann. c.* 19. § 12.

Hill v. Barnes. 2 Black. Rep. 1735.

Where ſuch ſearches are made by exciſe officers, the conſtable or peace officer muſt *be of the place* where the ſearch is made; it is not ſufficient that the perſon accompanying them is an officer by reputation. As here, where it appeared that the perſon had formerly been headborough of a pariſh, and had a board over his door with that name on it, but was out of office, and was by miſtake applied to by the exciſe officers in their ſearch, they were adjudged to be guilty of treſpaſs.

Legliſe v. Champante. 2 Stra. 820.

3. Though an officer proceeds regularly in the ſeizure of goods, yet it depends on the condemnation, whether the taking ſhall be deemed legal or not; for if the goods are not condemned he is a treſpaſſer.

Boſtock v. Saunders. 3 Wilſ. 434. 2 Black. Rep. 912. S. C. * P. 80.

By ſtat. 10 *Geo.* 1. §. 13. *c.* 10. power is given to officers of exciſe to ſearch at all times of the day entered warehouſes or places for tea, coffee, *&c.* But private houſes can only be ſearched, on oath of the ſuſpicion before a * commiſſioner or juſtice of peace, who can by their warrant authorize ſearch. Under ſuch a warrant obtained by the officer on his own oath of ſuſpicion, if a ſearch is made in a private houſe, and no goods found, the officer is liable to an action of treſpaſs, and the warrant ſhall be no juſtification; for the commiſſioners have no power to enquire into the circumſtances, and the officer takes the whole on himſelf.

Scott v. Shearman. 2 Black. Rep. 977. And Caſ. ibid.

4. But a condemnation of the goods ſeized, *in the Court of Exchequer* is ſo concluſive, and alters the property ſo effectually, that neither treſpaſs nor trover will after lie againſt the officer; for if an action would lie againſt the officer, the goods being bound by the condemnation, the judgment againſt the goods would be defeated by ſuing the officer.

Horne v. Booſey. 2 Stra. 952.

"Though it ſhould ſeem that this is only in the caſe "*officers* ſeizing within their own department," for where a perſon not the proper officer made a ſeizure improperly he was held liable to this action, though the goods had been condemned.

Henſhaw v. Pleaſance. 2 Black. Rep. 1174.

But a condemnation of the goods is only concluſive evidence in favour of the officer, *when it is made in the Court of Exchequer*, and does not extend to any other condemnations by inferior juriſdictions, as the boards of Exciſe and Cuſtoms. For in this caſe, after a condemnation by the Board of Exciſe, the owner of the goods recovered in treſpaſs againſt the officers, and their ſentence was adjudged not concluſive evidence.

5. Wh

5. Where goods are seized, the question often turns upon whom the *onus probandi*, the payment of the duty lies. * P. 81.

Before the statute 6 *G.* 1. *c.* 21. if an officer went into a trader's house to make a search, an action lay against him for the trespass unless he could prove that the goods therein were forfeitable. It was therefore provided by this statute, "That the officer should be protected who acts *bonâ fide*, "and on probable presumption, even though he mistakes "in the following cases. 1. Where goods are on board a "boat, without any officer. 2. Where they are coming by "the waterside. 3. Where there is credible information. "In all cases of seizure under these circumstances, as the "officer is not liable to an action, the owner may apply to "the commissioners, who, on proper circumstances appearing, will restore the goods. If the owner does not apply, "the officer proceeds to condemnation in the *Exchequer* by "prosecution, and in such case, § 41, *the proof of the payment of the duties lies on the owner, who claims them in the Exchequer.*" This clause confining the mode of proof only to cases where application had been made to the commissioners was made general by statute 12 *Geo.* 1. *c.* 28. § 8. which enacts, "That in all cases where foreign goods are "seized for non-payment of duties, *&c.* and any dispute "shall arise thereon, the proof of payment shall lie on the "owner or claimer of the goods, and not on the officer "who has made the seizure." Per DeGrey Ch. J. 2 Black. 813.

These statutes relate *only to suits for condemnation in the Exchequer*, but in actions of trespass, brought by the owner of the goods against the officer, the proof of the non-payment lies on the officer who seized the goods. * P. 82. Solomon v. Gordon & al. 2 Black. Rep. 813.

The seizure in the last case was of goods for non-payment of the *Custom-house duties*; but the same doctrine was held in the present case, on a seizure for non-payment of the duties of *excise*, *viz.* that the *onus probandi*, the non-payment of the duties, lay on the officer. * Henshaw v. Pleasance. 2 Black. Rep. 1174.

By statute 10 *Geo.* 1. *c.* 10. the proof of payment of the excise duties on tea, coffee, and chocolate, is laid on the owner or claimer in the *Exchequer*; but it extends not to action of trespass. 2 Ref.

And the same proof lies on the owner or claimer in the case of seizure of soap and candles by stat. 23 *Geo.* 2. *c.* 21. which also relates only to informations in the *Exchequer*.

6. By statute 17 *Geo.* 2. "all actions against revenue officers for any thing done in execution of their office must be brought within three months after the offence committed, and be laid in the proper county where the fact happened."

But though the *writ has been sued out* in a county where the offence was not committed, yet if plaintiff declares in the county where it was committed, it is good within the statute. Ballard v. Whitfield. Per Ld. Loughborough. G. Hall. Pasc. 27 G. 3.

4 *A general*

* P. 83. Entick v. Carrington. 2 Wilf. 275.

* 4. *A general warrant from a ſecretary of ſtate* to ſeize the perſon, papers, &c. of any one is illegal, and this action will lie *againſt the Meſſengers* acting under it, for entering into plaintiff's houſe, and ſeizing his papers.

2. I ſhall now conſider this action as againſt

Private Perſons.

Perkins v. Proctor & al. 2 Wilf. 382.

1. Treſpaſs lies at the ſuit of a perſon againſt whom a commiſſion of bankruptcy has been ſued, he not being an object of the bankrupt law, *againſt the aſſignees under the commiſſion*, for taking poſſeſſion of his houſe, goods, &c. for the commiſſion is void and of conſequence the taking is without authority, and the perſon whoſe property has ſo been invaded, is intitled to a remedy. For every man ſhould in applying to courts of limited juriſdiction know their extent, and juriſdictions are circumſcribed, 1ſt. With regard to *place*. As a leet or corporation: So that the cauſe of action muſt ariſe within them, 2d. With regard to the *ſubject matter*, as queſtions on exciſe. 3dly. With regard to *perſons*, as in the caſe of the *Marſhalſea*; ſo in the preſent, the perſon declared a bankrupt, not being an object of the bankrupt laws, is not within the juriſdiction of the commiſſioners. And in all theſe caſes where the court hold cognizance of matters not within their juriſdiction, their proceedings are void, as *coram non judice*; and treſpaſs lies either againſt the officer as before, or againſt * the perſon who applies to their juriſdiction, and acts under their deciſions.

Hard. 480. Caſe of the Marſhalſea. 10 Co.

* P. 84.

Hale's P.C. 150.

2. *Search warrants* if iſſued on proper application are legal, but muſt iſſue under reſtrictions, as 1ſt. there muſt be an oath; 2d. the grounds declared; 3. it muſt be executed in the day time; 4. by a known officer; 5. in the preſence of the party informing. And though all theſe precautions be obſerved, the perſon on whoſe ſuggeſtion and information the warrant iſſued, is liable to an action of treſpaſs if nothing is found, for breaking and entering the houſe for he is juſtified or not by the event.

3. By ſtatute 6 *Ann. c.* 18. "Guardians, truſtees, huſbands "ſeized in right of their wifes and tenants *pur auter vie* "holding over without conſent, after determination of their "intereſts, are made treſpaſſers."

Weaver v. Ward. Hob. 134. Arg.

4. If a *lunatic* commits a murder or felony, he ſhall not be puniſhed, for it muſt be done *animo felleo*. But if he commits a treſpaſs, either to the land or goods of another this action will lie.

3d. Having now conſidered for what injuries this action will lie, it remains to ſhew

FO

FOR WHAT INJURIES TRESPASS WILL NOT LIE.

1. "Treſpaſs will not lie againſt a *mere miniſterial officer for any thing done merely in purſuance of his duty*, though it is ſomewhat * in ſupport of a wrong, but a wrong to which he is no way acceſſary or aſſenting." * P. 85.

As where a diſtreſs was tortiouſly taken, and impounded in the pound, of which one of the defendants was keeper, and an action was brought againſt thoſe who took the diſtreſs, *and the pound-keeper*. The action was held not to lie againſt *him*, for he acted merely miniſterially, and was no way concerned in the tort. Badkin v. Powell & al. Cowp. 476.

But it was further the opinion of the court in this caſe, that if he had *exceeded his duty and aſſiſted in the wrong*, that he would be a party in the treſpaſs.

2. By ſtat. 1 & 2. *P. & M. c.* 12. "No diſtreſs ſhall be driven out of the hundred, except it be to a pound overt within three miles of the place where taken, and in the ſame ſhire, neither ſhall diſtreſſes be impounded in different places, under penalty of one hundred ſhillings and treble damages."

If the perſon diſtraining impounds the cattle in another country, he is not a treſpaſſer; for the taking was lawful; but it ſubjects him to the penalty of the ſtatute, 1 & 2 *Phil. & Mary, c.* 12. or an action on the caſe on the ſtatute of *Marlbridge*. Gimbart v. Pelah. 2 Stra. 1272. Woodcroft v. Thompſon. 3 Lev. 40.

3. So treſpaſs will not lie *for taking an exceſſive diſtreſs*; or treſpaſs will not lie where the firſt entry or taking was lawful, as here rent being due, and there being no ſubſequent abuſe, the remedy ſhould be a *ſpecial action founded on the ſtat. of Marlbridge, chap.* 4. For at common law a man might take a diſtreſs of more value than * the rent, as it was but in the nature of a pledge. Lynne v. Moody. 2 Stra. 851, &c. * P. 86.

4. "Treſpaſs, *vi & armis* does not lie againſt *leſſee for years for cutting down timber trees, and carrying them away, and ſelling them*;" but if after having cut them, he ſuffers them to lie, ſo as to give time for the property of the divided chattel to ſettle in the leſſor, there treſpaſs will lie, for it is not one continued act, and beſides that, leſſee for years has a ſpecial intereſt in the trees for repairs and ſhade; but if the caſe had been with an exception of the trees to leſſor, there leſſee cuts them he is a treſpaſſer, like as leſſee at will, againſt whom treſpaſs will lie for cutting trees, for ſuch acts determine his will. But as againſt tenant by ſufferance leſſor cannot have treſpaſs before entry. Aleyn 83. Herlakenden's caſe. 4 Co. 62. Litt. ſ. 71. Co. Litt. 57. a.

But even though the trees are excepted in a leaſe for years, yet if they are *deſtroyed or ſpoiled by leſſee's cattle* barking or topping them, no action of treſpaſs will lie, for defendant had the uſe of the ſoil, and the injury was done in doing that to which defendant had title and without his fault. Glenham v. Heuby. 2 Ld. Raym. 739.

5. "Wherever

5. "Wherever the law allows an entry on the land o
"another for a particular purpose, *as being for the good of th*
"*public*, treſpaſs will not lie."

Abſor v. French. As is the caſe of highways, which if they become impaſ
ſable, as by the overflowing of a river or other cauſe, paſ
* P. 87. ſengers *may juſtify going on the adjoining fields. But th
2 Show. 28. caſe is different of a *private way* over the land of another
Lev. 234 S. C. For there if the way becomes impaſſable, the perſon who
Taylor v. Whitehead. intitled to the way cannot juſtify going on the adjoinin
Dougl. 716. lands. For the grant of a way is only in a particular line, no
to the right or left, and the grantor is not obliged to repai

Lady Hatton v. Cotes. 6. Treſpaſs will not lie againſt the owner of an eſtray ſo
Camb Sum. taking him off the lands of the lord of the manor who ha
Aſſ. 197. ſeized him, without paying for his keeping: for the owne
1667. had the property and the lord may have *caſe* for th
Tr. per Pais. keeping, though he might have detained him till paid.

7. Treſpaſs will not lie againſt the maſter or ſeamen of
Rous v. Haſſard, at the Cockpit 22 March, 1749. king's ſhip or privateer for taking a veſſel *as prize* on th
ſeas, which capture is afterwards found to be illegal, and th
ſhip not to be a lawful prize in the court of admiralty. Fo
queſtions of prize or not prize belong excluſively to the cou
quot. Doug. 580. of admiralty, and where it has juriſdiction of the princip
queſtion, it ſhall alſo have it of the incidental ones, and b
ſide, the court of admiralty gives damages, *&c.* for the d
tention, therefore they ſhall not alſo be recovered in t
courts of common law.

Turner and Cary v. Nele. 1 Lev. Therefore where one who had letters of marque in t
Dutch war took an *Oſtender* for a *Dutch* ſhip and brought h
* P. 88. into harbour and libelled her as a prize and there was a ſe
243. Sid. tence *that ſhe was not a prize*, and the *Oſtender* * libelled
367. S. C. the admiralty for the damages ſuſtained *by hurt the ſhip r*
ceived in port, and a prohibition was prayed on the grou
that the injuries libelled for were done on land, and ſo th
an action lay at common law, but a prohibition was refuſe
as the original capture was at ſea, and the bringing her in
port, in order to have her condemned, but a conſequence
it, and not only the original, but the conſequences ſhould
tried in the Court of *Admiralty*.

Lindo v. Rodney. Mich. 22 Geo. 3. Quot. Doug. 591. This queſtion received a farther deciſion in a modern ca
which was an application for a prohibition to the Court
Admiralty, to ſtay them from proceeding to condemn goo
which had been captured at the iſland of *Euſtatia* by admi
Rodney, the property of *Britiſh* ſubjects, on the ground th
they had been taken on land. The court refuſed the prohi
tion, holding that an excluſive juriſdiction veſted in the Co
of *Admiralty*, and that the courts of common law had
cognizance whatever.

4th. I ſhall now inquire

By whom this Action may be maintained.

Co. Litt. 4 b. 1. "To maintain an action of treſpaſs, *an intereſt in the ſoi*
"*not neceſſary*; an intereſt in the profits is ſufficient, as
"w

who has *vestura terræ*, or *herbagium* may have trespass *quare clausum fregit*, for trampling down the grass, &c."

So if *J. S.* agrees with the owner of the soil to plough and sow it, and give him half the profits, *J. S.* may have this action *quare clausum fregit*, for treading down the corn, and the owner is not jointly concerned in the growing corn, but is to have half after it is reaped by way of rent, which may be of other things than money; though in *Co. Litt.* 142, it is said, it cannot be of the profits themselves, but that (it seems) must be understood of the natural profits. Welsh v. Hall. Per Powell at Wells 1700. Salk. M. S. S. * P. 89. Bull. N. P. 85.

But it should seem that plaintiff should have an *exclusive* right or property in the thing for which the action is brought. Wilson v. Mackreth. 3 Burr. 1824.

So where a meadow or common lands are annually divided among the parishioners by lot, after the portion is so marked out, they may respectively maintain trespass, but not before. Welden v. Bridgewater. Cro. Eliz. 421.

2. "Possession is a sufficient title to the plaintiff in trespass *vi & armis*, and where a person is in possession, that is the proper action for any injury done to the land."

For where plaintiff was assignee of a mine, and brought *trespass on the case* against defendant for taking the lead, it was held that plaintiff being in possession, should have brought trespass *vi & armis*, and he was non-suited. Harker v. Birbeck. 3 Burr. 1556.

3. "A special property is a sufficient title for the plaintiff in this action."

As where a *sheriff had taken goods under a fieri facias*, and they were forcibly taken away by the defendant; it was adjudged that the * sheriff might maintain trespass, though he had only a special property in the goods. Tyrrell v. Tash. Cro. Eliz. 639. * P. 90.

4. "The goods of the church belong to the *churchwardens*, and they maintain trespass for taking them." Hadman v. Ringwood. Cro. Eliz. 145. 179.

But the suit must be commenced while they are in office, for after their year expired they cannot commence a suit, though they may proceed in it after the year, if commenced before. † Dent v. Prudence & al. 2 Stra. 852.

5. *Baron & Feme* may join in action for a trespass done to the wife's land, as for breaking the close, &c. but if it is for taking and carrying hay, &c. the declaration should lay that it grew on her land, or it will be bad. ‡ Cookson v. Castline. Cro. Eliz. 96.

For the rule is, that for taking things merely personal, husband and wife cannot join in trespass: but for the taking things in action or injuries to the land of the wife, they should join. For the latter things survive to the wife, but not the former. Arundel v. Short, &c. Cro. Eliz. 133.

6. *Tenants in common* should join in an action of trespass for offences which concern their tenements in common, as for breaking their houses, or closes, feeding, wasting, or destroying their grass, cutting their woods, fishing in their vivary or such like. In which case they should have their action jointly, and recover their damages jointly, because the action is in the personalty, and not in the realty. Litt. § 315.

And

* P. 91. * And in such case the action shall go to the survivor, one of them dies.

Co. Litt. 198. a. And the law is the same of coparceners.

Ibid. And if two tenants in common be of goods, as an hou

Ibid. or other personal thing, if one die, his executor shall tenant in common with the other.

Sutton v. Moody. Salk. 556. 7. Trespass lies by the owner of the soil against a pers for breaking his close and hunting there, *and killing his coni* or other animals *feræ naturæ*; for the owner of the soil h the property of such animals *feræ naturæ*, as are found his land, and killed, and may have trespass for them. if a hare is started and killed on my land, it is my propert but it is otherwise if hunted into the ground of a third pe son, for then it is the hunter's.

2 Roll. Abr. 553. 8. Before an entry and actual possession one cannot mai tain an action of trespass, though he hath the freehold law; therefore an heir before entry cannot have trespa against an abator; but a disseisee may have it against a d seisor for the disseisin itself because he was in possession, b not for an injury after the disseisin.

5th. I shall now consider the

PLEADINGS *in this Action.*

* P. 92. * And 1st, Those on the part of the

PLAINTIFF.

1st. *Of the Declaration.*

Martin v. Kesterton. 2 Black. Rep. 1089. in C. B. 1. If plaintiff sues out a general writ of trespass, q *clausum fregit*, he may declare either *generally*, or *name place where the trespass was done.* If the plaintiff *names place in his writ*, and declares on it, defendant cannot the place; but if the *writ is general*, and plaintiff decl generally, or names the place in his declaration, yet defendant vary the place, and so put the plaintiff to his assignment.

Lambert v. Stother. Mich. 14 G. 2. Bull. 92. N. P. For as if the plaintiff declares, on a trespass in suc vill, defendant may reply *liberum tenementum*, and proves any part of the vill to be his freehold, he must judgment, plaintiff is therefore driven to his new ass ment; but Judge *Buller*, in this case, is of opinion, pleading generally *liberum tenementum*, would be bad, that defendant should give a certain name to his freeh for if plaintiff should also have a freehold in the same he may prove the trespass there, and have judgment.

Helw's v. Combe. Salk. 453. But if plaintiff gives the close a name, he must pro freehold in the close so named.

2. "W

* 2. "Where the treſpaſs ariſes from the abuſe of an "authority given by law, or a *tort* done ſubſequent to a "lawful act, it is ſufficient, in the declaration, to ſtate a "treſpaſs generally, and in the replication the particular "injury or abuſe." * P. 93.

As where plaintiff declared generally for breaking his houſe, and carrying away his goods, defendant juſtified the taking as a diſtreſs damage feaſant, plaintiff replied, that after the diſtreſs plaintiff had converted them to his own uſe. Defendant demurred, for cauſe that this was a departure, but the court held it to be none; for the abuſe of the diſtreſs made him a treſpaſſer *ab initio*, and it would be of no avail to the plaintiff to ſtate the converſion in his declaration, for it is no way neceſſary to his action, and if alledged need not be anſwered. It would be out of time to ſtate it in the declaration, but it muſt come out in the replication. Gargrave v. Smith. Salk. 221. Defendant Bull. N. P. 81.

3. In treſpaſs *de bonis aſportatis, the particular goods, &c. taken, muſt be ſtated in the declaration.*

For where the declaration was in treſpaſs for *taking* his goods generally, without ſaying what goods. After a verdict for the plaintiff, judgment was arreſted. Bertie v. Pickering. 4 Burr. 2455.

† So where it was for taking *piſces ſuos* generally. † Playter's caſe. 3 Co. 38.

* So where it was for breaking and entering the plaintiff's houſe, and taking *diverſa bona et catalla ipſius querentis*, judgment was arreſted; and the reaſon is this, that where the declaration is ſo general, defendant cannot juſtify, for he cannot juſtify as to *divers* goods. 2d, That unleſs the goods are ſpecified, a recovery in this action could not be pleaded in bar to another action brought for taking the ſame goods. * P. 94. Wyat v. Eſſington. 2 Stra. 167. 2 L. Raym. 1410. S. C.

"But this is the caſe only where the action is founded on the taking, or injury to the goods themſelves; but it is otherwiſe where the taking or injury is laid only by way of aggravation."

For where the treſpaſs was for breaking and entering the plaintiff's houſe, and throwing about and ſpoiling his goods. It was objected on demurrer, that the ſeveral goods in the declaration mentioned ought to have been ſet out. But it was over-ruled, for the ſpoiling of the goods was only laid in aggravation of the treſpaſs and was not itſelf the cauſe of action, which was the entering the houſe, and ſo need not be ſet out. Chamberlain v. Greenfield. 3 Wilſ. 292.

"So if the things ſufficiently appear by any reference to others ſet-out in the declaration, they need not be ſpecified."

As where the treſpaſs aſſigned was entering plaintiff's houſe, and taking ſeveral keys *pro apertione oſtiorum Domus ejus*. It was adjudged on motion in arreſt of judgment, that Layton v. Grindall. Salk. 643.

* P. 95. * that the number of the keys need not be mentioned, as being made ſufficiently certain by reference to the houſe.

4. "In treſpaſs *de bonis aſportatis*, plaintiff ſhould always "ſet out *a property in, or at leaſt poſſeſſion of the goods.*"

Burſer v. Martyn. Cro. Jac. 46. Joce v. Mills. Salk. 640. S. P.

In treſpaſs, plaintiff declared againſt the defendant, *quare equum cepit a perſona of the plaintiff.* After a verdict, judgment was arreſted; for he had not ſaid *equum ſuum*, or that he was taken out of his poſſeſſion; for otherwiſe it would not appear that plaintiff had any cauſe of action if he had neither property nor poſſeſſion.

Terry v. Stradwick. 2 Lev. 156.

And this was ruled ſo in a ſtill ſtronger caſe, where the treſpaſs was for *taking hay off plaintiff's land*, and judgment was arreſted for not ſaying *his hay*, though the preſumption was ſo ſtrong from the place from whence it was taken.

5. "So the declaration ſhould alſo ſtate the *value* of the "goods."

Strode v. Hunt. 2 Lev. 430. 4 Bur. 2455.

For where plaintiff declared "for breaking and entering his cloſe and carrying away his ſoil to the value of 40*s.* and continuing the ſaid treſpaſs by digging and carrying away from the 1ſt of *May* to the 1ſt of *June*, to his damage," the declaration was adjudged to be ill, for not ſetting out the value of the ſoil carried away during the *continuando*, but this would be cured by a verdict.

* P. 96. F. N. B. 96. Salk. 119.

* 6. Plaintiff may have one writ for ſeveral treſpaſſes, entering his houſe, cutting his trees, beating his ſervant and carrying away his goods; and theſe may be joined in one declaration. For to aggravate the damages plaintiff may join in his declaration, that, for which he could not have an action, and the party injured may have his action alſo.

Dix v. Brookes. 1 Stra. 61.

As where plaintiff declared in treſpaſs for breaking and entering his houſe, and beating his wife. It was moved in arreſt of judgment, that the wife ſhould have joined, that ſo ſhe might ſtill have her action for the aſſault and defendant be doubly charged: But the court held it well; for ſuch offences may be joined to aggravate the treſpaſs, and the party injured have an action ſtill. As in the caſe of a ſervant, who may have an action for his own injury, and the maſter for the loſs of his ſervice.

Newman v. Smith. Salk. 642.

But the plaintiff in treſpaſs, *vi et armis*, cannot recover damages for the loſs of the company of his wife, or ſervice of his ſervant, nor ſhould evidence be admitted to that head.

Co. Litt. 283. a. Sir Jonathan Peter v. Knoll. Cro. Eliz. 32.

7. In treſpaſs the day laid in the declaration is not material, for plaintiff may prove defendant guilty at any time previous to the action brought, and it ſhall be good for defendant being once a treſpaſſor ſhall always be one.

* Monckton v. Paſhley. Salk. 638.

* 8. In treſpaſſes of a permanent nature, in which the injury is continually renewed, (as by entering the plaintiff's cl

cloſe, and hunting * or ſpoiling his graſs.) The declaration ſhould ſtate the treſpaſs with a *continuando*: But where the injuries and acts terminate in themſelves, and being once done, cannot be done again, there can be no *continuando*; as killing a number of hares, each of which is a ſeparate act. But theſe are to be declared on, as done *diverſis diebus et vicibus*, between ſuch and ſuch a time. * P. 97. Fontleroy v. Aylmer. 1 L. Raym. 239.

So where there has been an ouſter of poſſeſſion and reentry, the ouſter and all acts done during it, may be laid with a *continuando*. And where after an entry the plaintiff has been again expelled, and again recovered poſſeſſion, he may have treſpaſs *for the whole time*, with a *continuando*. Sacheverel v. Sacheverel Cro. Eliz. 182.

But if treſpaſs is laid with a *continuando*, which cannot be continued, exception ſhould be taken at the trial, for the plaintiff ſhould recover but for one treſpaſs, and if things be laid *continuando* which cannot be ſo, it is nought after a verdict: But if the treſpaſs be of ſeveral particulars, and be laid with a *continuando*, and ſome cannot be laid with a *continuando*, and other of them may; the *continuando* (after a verdict) ſhall be held to apply only to treſpaſſes, which may be laid with a *continuando*, and the damages given only for thoſe. Per Holt. Salk. 639, &c. Brook v. Biſhop. Salk. 639.

9. In this action the treſpaſs muſt always be laid, *vi et armis*, or the declaration will be bad in ſubſtance, and ſo held on a general demurrer. 1ſt. Becauſe it alters the judgment from a *capiatur* to a *miſericordia*; ſecondly, becauſe, it belongs to the juriſdiction of the county court if the treſpaſs has been without *vi et armis*. Wildgooſe v. Kellaway. 2 Salk. 636. F.N.B. 196.

* 10. So it is matter of ſubſtance in declaring in treſpaſs *vi et armis*, to ſay, *contra pacem domini regis*. Cro. Jac. 443. * P. 98.

For where the declaration was for breaking plaintiff's cloſe and depaſturing it 36 *Car.* 2. *continuando* the depaſturing till 4 *Jac.* 2. "Contra pacem *domini nunc regis*." It was held naught, for there was no *contra pacem* as to the time of king *Charles* the Second. Incledon v. Burgeſs. Salk. 636.

So if the treſpaſs be laid in the late *king's* reign, *contra pacem* of the preſent, it is bad; but ſuch faults are cured by a verdict. Day v. Muſkett. Salk. 640.

2. *Of the Replication.*

1. "The declaration in this action being for the moſt part general, the replication ſhould bring the iſſue to a certain point, by traverſing one thing in particular."

As where in treſpaſs for taking a gelding, defendant pleaded, that the place where, &c. was one hundred acres, and *J. S.* ſeiſed thereof in fee, and that he as his ſervant, by his expreſs order took the gelding damage feaſant, the replication of *de injuria ſua propria*, would be bad, for that would traverſe three or four things, *viz.* that the place was his freehold: defendant his ſervant: the damage feaſance, &c. Cockerel v. Armſtrong. Paſch. 11 G. 2. C. B. Bull. N.P. 93.

" But the iſſue need not conſiſt of a ſingle fact, but it " ſhould be on a ſingle point, though it may conſiſt of ſe- " veral facts."

Raley v. Robinſon. 1 Burr. * P. 99.

Defendant to this action pleaded to one count, " a right of common for his own commonable * cattle levant and couchant." And to the ſecond, " a licence to cut down a tree to make a gate." Plaintiff replied to the firſt, that they were not his own commonable cattle, levant and couchant, and as to the ſecond, that the tree was not ſo applied, traverſed the licence, and concluded to the country. The defendant demurred ſpecially to the firſt replication for cauſe, that it was multifarious, compriſing three diſtinct facts, and to the ſecond, for cauſe that it concluded to the country, when it ſhould have concluded with an averment; but as to the firſt the court was of opinion, that the traverſe was good, for the ſeveral facts make but one point, *viz.* a right of common, which cuſtom neceſſarily conſiſts of thoſe parts, *viz.* a levancy and couchancy for his commonable cattle. And as to the ſecond, the court held, that by the denial of the licence, and admitting all the reſt, the plaintiff put the ſubſtantial matter in evidence, and ſo concluded rightly to the country.

Cary v. Holt. 2 Stra. 1238. Bull. N. P. 93.

3. Where plaintiff declares in treſpaſs on his poſſeſſion and defendant makes title, and gives colour to the plaintiff, the plaintiff's replication, which traverſes the defendant's title, without ſetting up any title in himſelf, but merely concluding with *de inj. ſua propria, &c.* is good. For treſpaſs is a poſſeſſory action, which poſſeſſion is here admitted in giving colour, and the replication lays defendant's title out of the caſe, and then it ſtands on plaintiff's poſſeſſion, which is ſufficient againſt a wrongdoer.

Fenner v. Fiſher. Cro. Eliz. 288. *P. 100.

As where in treſpaſs *quare clauſ. freg.* defendant juſtifies that one *J. Wright* was ſeized * in fee, and demiſed to him, and that plaintiff claiming by deed of feoffment had entered and been poſſeſſed. Plaintiff replied, *proteſtando*, that *Wright* was not ſeized in fee, pleaded *quod non demiſit modo & form.* And though under this replication plaintiff made no title in himſelf, yet he recovered; for being in poſſeſſion it was ſufficient to diſprove the title ſet out by defendant.

Webley v. Palmer. Salk. 222.

4. If plaintiff lays a day in his declaration, and defendant juſtifies as to that day, plaintiff may in his replication ſtate another day, and it is no departure, the day being immaterial. (*Ante* 96.)

Primer v. Philips. Salk. 222.

For to make a departure there muſt be a varying in the replication from ſomething materially alledged in the declaration.

Lambert v. Stother. Mich. 14 G. 2. C. B. Bul. N. P. 93.

5. In general, if defendant pleads that the place is freehold, plaintiff may reply three manner of ways, That the place is *his* freehold, and then he muſt always traverſe defendant's plea, unleſs he makes a new aſſignment, for ſuch is not inconſiſtent with defendant's plea, and ſo trav

traverſe is not neceſſary. 2. He may derive a title under the defendant himſelf, and then he muſt not deny its being the defendant's freehold. 3. He may ſet up a title not inconſiſtent with that of the defendant, in which caſe he may traverſe defendant's title or not, as he pleaſes.

However the plaintiff is only put to his new aſſignment of another place, where the treſpaſs * complained of is neceſſarily local, and plaintiff can recover ſatisfaction in that place only. Foreman v. *P. 101. Doleman. Gilb. Rep. 135.

2dly. I ſhall now conſider the

PLEADINGS *on the Part of the* DEFENDANT.

1. "A diſtinction is to be obſerved in pleading, where "the treſpaſs is *tranſitory* (as for taking goods, &c.) and "*where local* as *quare clauſum fregit*. For in the firſt caſe "defendant may plead generally, that *he was poſſeſſed* of the "place where, and took the goods damage feaſant, *ex. gr.* "and plaintiff is foreclоſed to pretend a right to the place, "nor can it be conteſted in evidence, for poſſeſſion is juſtifi"cation enough: But in treſpaſs *quare clauſum fregit* it is "otherwiſe, for there the plaintiff claims the cloſe in queſ"tion, and the right may be conteſted." Anon. Salk. 643.

Therefore in this caſe, which was treſpaſs *for taking plaintiff's cattle*, defendant pleaded that he was poſſeſſed of the cloſe, and that *plaintiff's cattle having treſpaſſed therein, he took them*; and the plea on the poſſeſſion only was held good. Anon. Salk. 643. ante.

So where the treſpaſs was taking and carrying away his goods in *D.* defendant pleaded that the *locus in quo* was his freehold, and that he took them damage feaſant; on demurrer plaintiff had judgment, for the treſpaſs, being tranſitory, no *locus in quo* is ſuppoſed. Helw Lomb. Salk. 453.

*2. The general iſſue in this action is *not guilty*, and where a perſon has been *indicted* for a treſpaſs, and has confeſſed, and the entry of *cognovit indictamentum* made on the record, he is ever after eſtopped to plead, *not guilty*, to an *action* brought for the ſame treſpaſs. *P. 102. 2 Hawk. P. C. 333.

3. But the moſt uſual plea in treſpaſs is a

Juſtification.

"As to this, if defendant has a ſpecial juſtification *he muſt plead it*; for he cannot give it in evidence on the general iſſue. For *not guilty* denies the taking, but a juſtification muſt admit it; and ſo the evidence would be inconſiſtent with the plea." Co. Litt. 282.

As when in treſpaſs defendant pleaded not guilty, and would have given in evidence *the taking of the things for a heriot*, the court refuſed to admit it; for he might have juſtified to that effect, and given plaintiff an opportunity of anſwering it. Dryer v. Mills. 1 Stra. 61.

So neither can he give in evidence on the general iſſue, that he had in the place a right to common or to a way, or other eaſement: Or that the beaſts came through the plain- 1 L. Raym. 732. Co. Litt. 283. a.

Watſon v. Sparks. Salk. 287.

tiff's hedge, which he ought to repair; or that he entered to take his emblements; or that the place was an highway; or in aid of an officer in execution of proceſs, or ſuch like ſpecial juſtifications.

2 Roll. Ab. 676. 7. Bro. Gen. Iſſ. 82.

But he may on *not guilty* pleaded to treſpaſs *vi et armis*, give in evidence, a leaſe for years, * not a leaſe at will, (for that is as a licence countermandable at pleaſure) or that his ſervant put the cattle in without his aſſent.

*P. 103. Haywood v. Davis. Salk. 4.

So on the general iſſue defendant may give in evidence, that he is tenant in common with the plaintiff (for one tenant in common cannot have treſpaſs againſt the other, *Litt.* § 323.) But defendant ſhould plead it in abatement, that plaintiff was tenant in common with another perſon; ſo jointenantcy ſhould be pleaded in abatement, and cannot be given in evidence on the general iſſue.

Jones v. Randal. Hill. 1652. Tr. per Pais, 207.

2. In pleading a juſtification there is a difference in the caſes of an *officer* acting under proceſs of court, and of *a private perſon.*

Britton v. Cole. Salk. 408. Cotes v. Mitchell. 3 Lev. 20.

1. In treſpaſs againſt the *ſheriff*, it is a ſufficient juſtification that he ſhews his writ, without ſhewing a judgment. So it is in the caſe of his bailiff or officer, with this difference, that the ſheriff muſt ſhew the writ *was returned*, if returnable, but the bailiff need not, becauſe it is not in his power.

Ibid.

But in treſpaſs againſt the *plaintiff, or a mere ſtranger*, they cannot juſtify, unleſs they *ſhew a judgment*, as well as an execution, for the judgment might be reverſed, and it ought to be at their peril if they take out execution afterwards.

Freeman v. Blewitt. Salk. 489. *P. 104.

And the caſe is the ſame of all *principal officers of inferior courts*, as has been laid down as to ſheriffs, *viz.* that they muſt ſhew * returnable proceſs returned. This was the caſe of a ſerjeant at mace of the ſheriff's court of *London*. Principal officers ſeems to mean thoſe only who have return of writs.

Higginſon v. Martyn & Hadley. Mich. 28 Car. 2. Bull. N. P. 83.

2. Though an *officer* may juſtify under the *meſne proceſs* of an inferior court, without ſaying that the cauſe of action aroſe within its juriſdiction, yet if he juſtifies under *proceſs of execution*, he ought to ſhew that the *cauſe of action aroſe within the juriſdiction* of the court, or *at leaſt was ſo laid*. But that would not be a ſufficient juſtification *to the plaintiff in the action*, who ought to know the extent of the juriſdiction he applies to for redreſs.

Pinager v. Gale. 2 Vent. 100.

3. If defendant juſtifies the taking under a plaint levied in an inferior court, and precept to the ſheriff to take, the plea ſhould, 1ſt, If the court was not of record, *ſet out the proceedings at large*, it is not ſufficient to ſay, *taliter proceſſum*. 2. It ſhould be ſhewn that the debt aroſe within the juriſdiction. 3. It ſhould ſay, that the precept was *directed by* the ſaid court, not that *it iſſued out of it.*

Mathews v. Carew. Salk. 107. Wilton v.

4. If defendant juſtifies the taking *as bailiff* of an inferior court (as the leet,) for an amercement; for an offence within the leet, it is ſufficient for him to ſay that the offence was *preſented*, for *non reſort* as to him, whether in fact the offence was

was committed or not. But, 2dly, he ſhould ſtate an *eſtreat by the court, or warrant* from the ſteward, for that is his authority. And in the caſe of a *private perſon*, the plea in all caſes ſhould further ſtate. Firſt, an * amercement *by the jury*, it is not ſufficient to ſtate an amercement generally. 2. That the *amercement was affeered* to ſo much. 3. That the plaintiff was reſiant within the leet. Hardingham. Hob. 129. Conyers v. *P. 105. Franks. 3 Lev. 19.

5. If one comes in aid of an officer, at his requeſt, he may juſtify as the officer may do, but ſuch requeſt or command is traverſable: As in treſpaſs, if defendant juſtifies damage feaſant, or by diſtreſs for rent, he muſt make himſelf bailiff to the perſon having right, or that he did it by his command, but the command is traverſable. Salk. 409. Salk. 107.

3. "And in general wherever a perſon juſtifies a taking "under any authority whatever, he muſt ſhew every matter "and part of that authority under which he juſtifies."

As when defendant juſtified the taking of a cloth out of a pack, as deputy of grantee of the place of alnager, and that the piece of cloth had not the alnage ſeal on it; the plea was on demurrer adjudged to be bad, 1ſt, He did not ſhew the patent appointing the alnager. 2. That it was an office which could be executed by deputy. 3. That there being two ſtatutes 27 *H.* 8. 12. & 6 *Ed.* 6. *c.* 4. which give a penalty for expoſing cloth to ſale without the alnage ſeal, he did not ſhew on which he ſued. 4. He did not ſay where the deed appointing him deputy was ſealed and delivered. Watkyns v. Johns. Cro Eliz. 187.

And theſe caſes following have been decided as to what juſtifications are good, and what otherwiſe.

* 1. In treſpaſs for cutting plaintiff's nets and oars, defendant juſtified that plaintiff and others came into his fiſhery, and would have taken his fiſh, wherefore to prevent it, he deſtroyed their nets, *&c.* The plea was adjudged ill on demurrer, for *he ſhould have taken them damage feaſant*, and not cut and deſtroyed them. *P. 106. Reynell v. Champernon. Cro. Car. 165.

2. If tenant for life dies, his executor ſhall have convenient time to remove his cattle and effects off the lands: And therefore where treſpaſs was brought, and the executor pleaded, that the cattle remained on the land for ſix days, *being the time required before he could get a place for the cattle.* It was held to be good. Stodden v. Harvey. Cro. Jac. 204.

3. Defendant, in treſpaſs for entering plaintiff's houſe, and taking a corſelet and pike, pleaded, that he had purchaſed them from a perſon to whom they belonged, had entered plaintiff's houſe *by permiſſion of his wife* and took them; it was adjudged ill, for the wife could give no permiſſion. Tayler v. Fiſher. Cro. Eliz. 245.

4. So in treſpaſs for taking goods, it is a good plea that they were the property of defendant himſelf, and that finding them in plaintiff's poſſeſſion, he took them again; for a man may take his own goods where he finds them, when out of his poſſeſſion by wrong, and not by his own delivery. Chapman v. Thumblethorp. Cro. Eliz. 329.

5. Other

5. Other juſtifications are mentioned before, as it is good that defendant came on plaintiff's ground in purſuit of ravenous beaſts, &c. &c.

*P. 107. *3. "In all caſes of pleading where a juſtification is local "or ſpecially aſſigned by plaintiff, and defendant juſtifies at "a different place or in a different manner, the plea ſhould "conclude with a traverſe."

Benjamin v. Holwell. 1 Wilſ. 81. Thompſon v. Clark. Cro. Eliz. 504. S. P.

As in treſpaſs for taking plaintiff's cattle at *Hereford*, defendant juſtified the taking as bailiff of the manor of *A.* as a *diſtringas* to compel plaintiff's appearance at the manor court and concluded *quæ eſt eadem tranſgreſſio*, without traverſing the place laid in the declaration; and on ſpecial demurrer the plea was held ill, for want of the traverſe, for it was no anſwer to the treſpaſs laid at *Hereford*, that not being excluded by the traverſe.

"But where defendant has been a treſpaſſer at the place "laid in the declaration, though not as to the whole, or it "is a continuation of the ſame treſpaſs; he need not con- "clude his plea with a traverſe."

Riley v. Parkhurſt. 1 Wilſ. 219.

As where in treſpaſs for *taking* plaintiff's cattle at *Teddington*, defendant juſtified the taking them at *Kingſton*, damage feaſant and that he carried them to *Teddington* where he impounded them: on demurrer it was objected, that the juſtification was local and therefore that defendant ſhould have traverſed the place in the declaration, *ſed non allocatur* for when the defendant ſays that he impounded them at *Teddington*, if he had no right to take them, he was a treſpaſſer there and ſo agreeing in the place, he ſhould not have traverſed.

*P. 108. * 2. "And it is the ſame where a treſpaſs is juſtified in a "*manner* different from what it is aſſigned."

Hill v. Prideaux. Cro. Eliz. 384.

For where the treſpaſs aſſign'd, was, that defendant had chaſed plaintiff's cattle, *ita quod per fugationem interierunt*. Defendant pleaded that the *locus in quo* was held of him by certain ſervices, and that he diſtreined the beaſts for the ſervices, and put them into pound overt, where they periſhed *by hunger* by default of plaintiff, which is the ſame treſpaſs; the plea was adjudged to be ill, for having aſſigned a different cauſe of the beaſts death, he ſhould have traverſed the cauſe ſet out by the plaintiff.

I ſhall now conſider other

Pleas in Treſpaſs.

1 Roll. Ab. 128.

4. *Accord and ſatisfaction* is a good plea in treſpaſs, but not accord alone without ſatisfaction. As where in treſpaſs for taking plaintiff's cattle, it was held a bad plea, that there was an accord, that plaintiff ſhould have his cattle again, for that was no ſatisfaction.

"An

"And the plea ſhould ſhew *how* the ſatisfaction was made, "that the court may judge if it is good."

For where to treſpaſs *quare clauſ. freg.* defendant pleaded that the treſpaſs had been done * by him, and one *Jane Rowland*, and that after the treſpaſs it had been accorded, between the plaintiff and *Jane Rowland*, that ſhe ſhould abate fourteen ſhillings, which were due to her by the plaintiff's father, and that ſhe had abated them; on demurrer the plea was held bad, for it did not ſhew *how ſhe had abated the money*, for it ſhould be ſuch as would be an abſolute bar to the demand in future, as the ſatisfaction ſhould be of value. It was further agreed, that though the ſatisfaction was not to plaintiff himſelf, yet that being made at his requeſt and by his conſent, that it was good. Hillman v. Uncles. Skin. 391. * P. 109.

So in pleading an arbitrement which is a plea ſimilar in its nature to this, defendant ſhould ſhew the place where the ſubmiſſion was and alledge performance of his part. Hare v. Gorge. Cro. Eliz. 66.

5. *A releaſe* is a good plea in treſpaſs.

1. But if defendant pleads a releaſe before the time of the action brought, he muſt alſo go on and plead with an *abſq. hoc that he is guilty at any time after.* For plaintiff may prove a treſpaſs at any time before action brought; ſo that the plea ſhould cover the whole time to the bringing of the action. Webley v. Palmer. Salk. 222.

2. If a treſpaſs is joint, a releaſe to one is good to all; for though a treſpaſs be committed by ſeveral, yet it may be ſued againſt one or againſt all, for in treſpaſs all are principals and each is anſwerable for his fellow's act; and as there can be but one ſatisfaction, * a releaſe is a releaſe of the treſpaſs and all have equal benefit. Cooke v. Jenner. Hob. 66. * P. 110.

And on this ground, if plaintiff brings a joint action of treſpaſs and the parties ſever in their pleas, and one is tried and found guilty and damages aſſeſſed, plaintiff may enter a *noli proſequi* as to the others. Parker v. Sir J. Lawrence. Hob. 70.

And on the ſame ground, where a treſpaſs was committed by two and recovery by verdict of damages againſt one, this was by two judges to one held to be a good plea in bar to an action brought againſt the other. For plaintiff had elected to bring his action ſingle and could have but one recompence. Norton's Caſe. Cro. Eliz. 30.

6. By ſtatute 21 *Jac.* 1. *c.* 16. The defendant to an action of treſpaſs *quare clauſ. fregit* may plead a diſclaimer and that the treſpaſs was by negligence and involuntary and tender ſufficient amends before the action brought, whereupon or ſome of them, plaintiff ſhall be enforced to join iſſue.

But the defendant cannot plead tender of amends *alone*, for the ſtatute only gives ſuch plea in the caſe of an involuntary treſpaſs and diſclaimer. Bailey v. Vivaſh. 1 Stra. 549. 2 Roll. Ab. 570. Co. Litt. 283. a.

7. By ſtat. 24 *Geo.* 2. *c.* 44. Conſtables not being liable for any thing done under a juſtice's warrant, that is a good plea. But by 7 *Jac. c.* 5. they may plead the general iſſue, and give the ſpecial matter in evidence.

8. The

*P. 111. * 8. The ſtatute of limitation is a good plea in this action; it is founded on ſtatute 21 *Jac.* 1. *c.* 16. *ſ.* 3. which enacts that all actions of treſpaſs *quare clauſum fregit*, ſhall be brought within *ſix years* after the cauſe of action accrued; and if on any ſuch actions, judgment be given for the plaintiff and be afterwards reverſed for error, or judgment be arreſted, the plaintiff may bring a new action within one year after.

Clare v. Froſt. 9. Defendant in pleading may plead *two matters in juſtification*. As here, 1ſt. The cutting down a tree for repairs. 2. That the tree ſtopped *a* water-courſe, wherefore he cut it.

I ſhall now proceed to conſider the

EVIDENCE *in this Action.*

And firſt on the part of the

Plaintiff.

2 Black. Rep. 1. 1. " The evidence muſt always follow the iſſue, that is " no matter out of it ſhall be given in evidence which might " have been replied, and would have ſupported the action. " For the evidence ſhould only go to diſprove the facts in " the plea."

Dayrolles v. Howard. 3 Burr. 1385. As in treſpaſs by the lord againſt a commoner, for ſpoiling and deſtroying his peat and filling up the holes, defendant juſtified under a right of common, and becauſe that he *P. 112. * was hindered from enjoying his common, in ſo ample a manner, by reaſon of the heaps of peat, that he removed them and filled up the holes, plaintiff replied, *de injuria ſua propria* generally. And on iſſue joined would have given in evidence, *that there was a ſufficiency of common left*, but it was held that he could not, it not being within the iſſue.

Sipporah v. Baſſett. Sid. 225. 2. If the principal treſpaſs will bear an action, the plaintiff may under the general clauſe of *alia enormia fecit, give in evidence* to encreaſe the damages, *any thing that will not itſelf bear an action*, as *ex. gr.* an injury *ex turpi cauſa*. But *what would itſelf bear an action muſt be ſtated in the declaration*. As in treſpaſs *quare clauſ. freg.* plaintiff would not be allowed to give in evidence, that the defendant then took away his horſe. For that would bear an action itſelf. But he might, that he entered his houſe and debauched his daughter, for that will not bear an action, but is an injury *ex turpi cauſa*.

2 Roll. Ab. 677. 3. " If in treſpaſs *quare clauſ. fregit*, the plaintiff ſets out " the abuttals of his cloſe, he muſt in evidence prove every " part of his abuttals; as if it be a *parte Auſtrali* of the mill " of *A.* he muſt prove the mill there and that it was in the " tenure of *A.* but it will be ſufficient, though there is an " highway between them. So if the abuttal is laid to the " Eaſt, if proved to the North Eaſt it is ſufficient."

So

• So if the treſpaſs is laid in an acre, laid with proper abuttals, proof of a treſpaſs in half an acre will be good, for the abuttals extend only to the whole acre. *P. 113. Winkworth v. Mann. Yelv. 114.

4. When the treſpaſs is laid with a *continuando*, the plaintiff ought in evidence to confine himſelf to the time in the declaration. But he may waive the *continuando* and prove a treſpaſs on any day before the action brought, or he may give in evidence only part of the time laid in the *continuando*. Per. Holt, at Hertford. 4 Ann. Buller, N. P. 86.

In treſpaſs with a *continuando* plaintiff ſhould prove a reentry, for otherwiſe he ſhall only have damages for the firſt entry. Trials per Pais. 232.

5. In treſpaſs *de bonis aſportatis*, as plaintiff is obliged to ſet out the particular goods in his declaration, ſo he can *only prove the taking of ſuch goods as are mentioned in the declaration*; for as the reaſon for ſpecifying the goods is to enable defendant to plead the former action in bar to another for taking the ſame goods, plaintiff ſhall for the ſame reaſon be confined in his proof, for if admitted to give evidence of the taking of things not in the declaration, he might recover twice for the ſame things. Bull. N. P. 84.

6. If the plaintiff makes a new aſſignment and the general iſſue be joined on it, plaintiff *cannot prove the defendant guilty at the place mentioned in the plea in bar*, for by the new aſſignment, he waives the place whereto defendant has pleaded. And if the place aſſigned by the plaintiff be the very *locus in quo* pleaded by defendant yet defendant ſhould not rejoin that it * is ſo, but plead the general iſſue, *not guilty*, and at the trial he muſt have a verdict, becauſe the plaintiff by his new aſſignment waived that place. Fuſton v. Crouch. Cro. Eliz. 492. *P. 114.

Therefore when defendant juſtified in a place called *A.* as a freehold, and the plaintiff by way of new aſſignment ſaid the place in which, &c. was called *B.* it was held no plea to ſay, that *A.* and *B.* are the ſame place, for by the new aſſignment the bar was was at an end. Year Book. 27 H. 8. 7.

2. I ſhall now conſider

The Evidence on the Part of the Defendant.

1. "If defendant juſtifies, if he proves a good title in himſelf, though not ſtrictly as ſet out in the plea, it is ſufficient."

As where in treſpaſs defendant juſtified the taking, by plea, that the houſe of the plaintiff was held of the Earl of *Northumberland*, by homage fealty, *ſuit of court*, *eſcuage uncertain*, encloſing his park with pales, and rent of a pound of cummin, and he for three years rent and ſubtraction of ſuit ſeized the taking; he proved, and the jury found, that he held by homage and fealty, and encloſing his park, and a pound of cummin, and defendant had judgment, for the thing agreed in ſubſtance with the title ſet out. Goodman v. Ayling. Yelv. 148.

2. In

Wood v. Cheſſal. 2 Black. Rep. 1254. & Caſ. ibid.

2. In treſpaſs againſt officers of the exciſe and cuſtoms, they may plead the * general iſſue, and give the ſpecial matter in evidence.

*P. 115.

3. Evidence of a taking under a *fieri facias*: For the difference, when by an officer, and when by plaintiff or ſtranger. Vid. ante pag. 77. *Martyn* v. *Podger* and *Lake* v. *Billers*.

Caſe of Page and Crook. Style 401.

4. If treſpaſs be brought againſt one *ſimul cum* others, nothing be proved againſt one, he may be examined as witneſs for the reſt.

Having conſidered the caſes on this action and the pleadings, the ſubſequent proceedings now remain, *viz.*

6th. *The Verdict, Damages, Judgment and Coſts.*

1ſt. *Of the* VERDICT, DAMAGES AND JUDGMENT.

Dawkes v. Pilfield Cro. Jac. 297.

1. Plaintiff cannot recover *more for damages* than he h laid in his declaration. But for damages *and coſts* togeth he may have judgment for more than he laid, for the ſ may have been of long continuance.

Hill & al. v. Goodchild. 5 Burr. 2790.

2. In a joint action of treſpaſs, *where the jury find th jointly guilty, the jury cannot ſever the damages* according the degrees of guilt. And therefore where in the *Comm Pleas* the plaintiffs in this action were declared againſt joint and a verdict againſt one for one ſhilling, and againſt other for forty ſhillings and * judgment; on error brou into the *King's-Bench*, the judgment was reverſed.

*P. 116.

Onſlow v. Orchard. 1 Stra. 422.

"And the caſe is the ſame where there is a judgment "default." For where the caſe was ſo, and on a writ inquiry the damages were found as to one 20*l.* and as to other one ſhilling; judgment was arreſted.

2. But this is the caſe where the defendants *plead join* for if they ſever in their pleas, different damages may aſſeſſed as to each.

Chapman v. Houſe & al. 2 Stra. 1140.

For where in treſpaſs againſt three, one let judgment by default; another pleaded not guilty, and the third murred to the declaration: Before trial of the general i there was likewiſe a writ to aſſeſs damages on the judgm by default, and contingent damages on the demurrer. jury gave a verdict for defendant on not guilty, and aſſe 100*l.* as to one of the other defendants, and one ſhillin to the other, and *Lee C. J.* was of opinion that the judgm ſhould be accordingly, they having ſevered in their plea

Rodney v. Strode. Carth. 20.

3. So the rule firſt laid down applies only, *where the ing is joint.* For the jury may find them ſeverally guil to part, and not guilty, as to part, and aſſeſs damages rally.

Biggs v. Greenfield. 1 Stra. 810.

4. Where there are two defendants ſued jointly who in defence, or if one lets judgment go by default, an other juſtifies. As in treſpaſs for taking goods againſt

if one lets judgment go by default, or one * pleads not guilty, and the other juſtifies the taking as a diſtreſs, or by licence from the plaintiff to ſell, or that plaintiff gave him the goods, if the defendant who juſtifies has a verdict, judgment ſhall be arreſted as to the other, ſince upon the whole it appears, that plaintiff had no cauſe of action. *P. 117. Tilly v. Moody, cited Hob. 54.

5. "The jury in finding their verdict may vary from the declaration, and find only part of what is laid."

As if the declaration be for taking a ſtack of rye, they may find defendant guilty as to five quarters, and not guilty as to the reſt; ſo if the declaration be for cutting and taking away trees, they may find defendant guilty of the taking, though not of the cutting. 2 Rol. Abr. 684. Cro. Car. 54.

2. It now only remains to conſider the *coſts*.

1ſt. *To Plaintiff.*

This is founded on ſeveral ſtatutes, which I ſhall take in their order. The ſtatute of *Glouceſter* gives coſts, wherever there are damages. The firſt ſtatute after this was 43 *Eliz.* 6. which enacts, "That in actions perſonal not being for title to land, if the judge certifies that the damages are under forty ſhillings, the plaintiff ſhall have no more coſts than damages."

This ſtatute was for the purpoſe *of taking away coſts* from them the plaintiff where the * damages were under forty ſhillings, by enabling the judge to give a certificate to that purpoſe, as otherwiſe under the ſtatute of *Glouceſter* plaintiff would have coſts, by reaſon of the damages. And certificates have been granted on it, to take away plaintiff's coſts. *P. 118. Walker v. Robinſon. 1 Wilſ. 93 & caſ. ib. 2 Stra. 1232. S. C.

2. The next ſtatute was 22 & 23 *Car.* 2. *c.* 9. which enacts, That in treſpaſs and other actions perſonal, if the jury find under forty ſhillings damages, plaintiff ſhall have no more coſts than damages, unleſs the judge ſhall certify, *that the freehold or title to the land came principally in queſtion.*"

As by the firſt part of this ſtatute coſts were taken away in all caſes of treſpaſs under forty ſhillings, *it gave them* the plaintiff in one caſe, that is where the freehold or title of the land did come in queſtion, the damages in ſuch caſe being in general but ſmall, the land itſelf being the object. Accordingly theſe deciſions have taken place.

1. Though the words of the ſtatute are *treſpaſs* in general, the ſtatute only extends to *treſpaſs quare clauſ. fregit*, that is, to caſes wherein the freehold could come in queſtion, and not to treſpaſs *de bonis aſportatis*, or trover, or ſuch actions. That is in thoſe actions, be the damages however ſmall, plaintiff ſhall have his coſts, becauſe in theſe the freehold could not come in queſtion. But in treſpaſs *quare clauſ. freg.* in which the freehold *could* come in queſtion, plaintiff ſhall not have his full coſts, unleſs the judge ſhall certify, *that the freehold did come in queſtion.* Moor v. Hall. Trin. 1 G. 1. Bull. N. P. 329.

2. "There-

*P. 119. Kempſter v. Deacon. 1 L. Raym. 76. 2 Salk. 665. S. C.

*2. Therefore if it appears from the pleadings themſelves that the title to the land did come in queſtion, (as where a view was granted,) there plaintiff ſhall have his full coſts without any certificate.

So where to treſpaſs *quare clauſ. freg.* defendant juſtified for a way, and plaintiff replied *extra viam*, upon which iſſue was joined, and twopence damages. Plaintiff had his full coſts without a certificate, for it appeared that the freehold was in queſtion.

Higgins v. Jennings. 2 Stra. 726. Beal v. Moor. 2 Stra. 1168. S. P.

3. "So that the caſes in which a certificate is neceſſary are, when by preſumption the freehold might come in queſtion, but it is doubtful whether it did ſo or not, in theſe caſes a certificate is required."

Clegg v. Molyneaux Doug. 749.

As when the treſpaſs was for breaking plaintiff's cloſe and taking and carrying away divers quantities of peat and turf, damages one ſhilling. There being no certificate, the court held that plaintiff ſhould have no more coſts than damages, as the freehold might come in queſtion.

Blunt v. Miller. 1 Stra. 645.

So where the treſpaſs was for breaking and entering plaintiff's houſe, and keeping him out of poſſeſſion for a month.

Anon. 2 Vent. 48.

So where it was for breaking plaintiff's cloſe, and putting ſtakes on the land.

Hill v. Reeves C. B. Paſch. 3 G. 1. Birch v. *P. 120. Daffy. C. B. Trin. 3 G. 1. Bull. N. P. 329.

So for breaking plaintiff's houſe, and deſtroying his window-ſhuts and bolts, ſo for cutting his trees. In all theſe caſes, the damages being under forty ſhillings, and no certificate, as the freehold might have come in queſtion the court held, that plaintiff ſhould have no more coſts than damages.

4. "And therefore if it appears from the pleadings that the freehold could not come in queſtion, the plaintiff ſhall have his full coſts, though the damages are under forty ſhillings."

Lord Dacre. v. Tebb. 2 Black. Rep. 1151.

As where the treſpaſs was for breaking and entering the plaintiff's *free warren* and killing his game, and damages one ſhilling, Plaintiff had his full coſts, for the freehold could not come in queſtion, on the right of franchiſe of free warren.

Keen v. Whiſtler. Gilb. Rep. 197.

So where the treſpaſs was for entering plaintiff's cloſe and chaſing his cows and fowls, and damages under forty ſhillings, plaintiff had his full coſts. *S. P. Thompſon* v. *Berry. Stra.* 551.

This is the caſe of all treſpaſſes *de bonis aſportatis.* In which caſe of *aſportavit* of perſonal things, there are always full coſts.

Reeves v. Butler. Gilb. Eq. Rep. 196.

5. But there are certain exceptions to be obſerved; as firſt if there are two counts in the declaration and one is *de bonis aſportatis*, but in the other the freehold might come in queſtion, if the jury find damages entire, though under forty ſhillings, plaintiff ſhall have his full coſts. For as part of the damages muſt be applied to the count, *de bonis aſport*

* *aſport.* it ſhall carry coſts for the whole. But it had been otherwiſe had the jury found not guilty as to that count and a verdict on the other under forty ſhillings. *P. 121.

So if there are many counts in a declaration, if plaintiff has a verdict on one count, he ſhall have coſts of the whole declaration. Norris v. Weldron. 2 Black. Rep. 1199.

2. "Where *ſpecial damages* are laid by way of aggravation, if they *are of themſelves actionable*, plaintiff ſhall have his full coſts, though the damages are under forty ſhillings. But if the *ſpecial damage* laid *would not bear an action*, plaintiff ſhall have no more coſts than damages under forty ſhillings, if it is treſpaſs which requires a certificate. 1 Stra. 192.

As where the treſpaſs was, for putting diſeaſed cattle into plaintiff's cloſe *per quod* his cattle were infected, and verdict for plaintiff damages twenty ſhillings, he had his full coſts becauſe the ſpecial damage was itſelf actionable. Anderſon v. Buckton. 1 Stra. 192.

But where plaintiff declared in treſpaſs for entering his houſe and making an affray and continuing there, till the plaintiff gave him a note for 6*l.* verdict for plaintiff, and one guinea damages. It was adjudged that the continuing was only aggravation and no diſtinct actionable fact, and therefore the damages being under forty ſhillings plaintiff could have no more coſts than damages, * beſides too the freehold might have come in queſtion. Appleton v. Smith. 3 Burr. 1282. *P. 122.

3. Where *a cauſe was originally commenced in an inferior court, if removed into K. B. or C. B. and* the damages found be under forty ſhillings, plaintiff ſhall have his full coſts, without a certificate. Roop v. Scritch. 4 Mod. 378.

4. On *writs of inquiry* in caſes within the ſtatute, the plaintiff ſhall have his full coſts, though his damages are under forty ſhillings. Sheldon v. Ludgate. Trin. 3. G 1. *C. B.*

6. By ſtat. 4 & 5 *W. & M. c.* 23. "Every apprentice, inferior tradeſman, or diſſolute perſon, who is convicted of a treſpaſs in fiſhing, hunting or fowling in another ground, ſhall pay full coſts." Bull. N. P. 329.

If a perſon is an inferior tradeſman, it matters not what his qualification is in point of eſtate, for if convicted of ſuch treſpaſs, he ſhall pay full coſts. Bennet v. Talbois. 1 L. Raym. 149.

But it ſeems not eaſy to be decided who is an inferior tradeſman, the court being equally divided in the queſtion, though it ſeemed the better opinion that it ſhould have been left to the jury to decide, who was or was not an inferior tradeſman. Buxton v. Mingay. 2 Wilſ. 70.

But 1ſt. a gentleman's huntſman is not a diſſolute perſon within the ſtatute. 2dly, The court held in this caſe, that plaintiff declares * againſt a defendant as a diſſolute perſon who proves not to be ſo, that he ſhall not for that reaſon be non-ſuited. For the ſtatute gives no new cauſe of action, the treſpaſs ſued for is ſtill as before, and this is only a collateral Pallant v. Roll. 2 Black. Rep. 900. *P. 123.

a collateral matter affecting the coſts, ſo that if the coſts are under forty ſhillings, plaintiff ſhall have no more coſts than damages.

7. By ſtatute 8 & 9 *W.* 3. *c.* 11. "In all actions of treſ- "paſs in which the judge ſhall certify the *treſpaſs to be wil- "ful and malicious*, tho' the damages are under forty ſhil- "lings, plaintiff ſhall have full coſts."

3 Black. Comm. 214. And every treſpaſs is *wilful* where defendant having notice to depart or is warned not to come on the land, ye does ſo notwithſtanding, and *malicious* where it appears to b done to haraſs the defendant.

Ford v. Parr. and Al. 2 Wilſ. 21. The certificate by the judge under this ſtate muſt be *mad in court* after the trial, and cannot be given afterwards.

It may not be amiſs to obſerve on the object of theſe tw laſt mentioned ſtatutes; that as under ſtatute 22 & 23 Ca 2. The damages being under forty ſhillings, the plainti was deprived of his coſts, this ſtat. 8 & 9 *W.* 3. was for th purpoſe of giving them to him in the particular caſe of wilful and a malicious treſpaſs, and as the not paying of coſ was a benefit to defendant, the ſtatute 4 & 5 *W.* & *M.* w

*P. 124. to take that away and annex coſts as a * puniſhment, in ca of treſpaſs by apprentices, &c.

2. I ſhall now conſider the caſes of

Coſts to the Defendant.

1. By ſtatute 4 *Jac.* 1. *c.* 3. If any perſon commences action of treſpaſs or other actions in which plaintiff mig have his coſts and after defendant's appearance becom non-ſuited, or verdict paſſes againſt him, defendant ſha have coſts.

Grave v. Grave. Cro. Eliz. 33. But if an infant brings treſpaſs by his guardian, and non-ſuited, he ſhall not pay coſts.

2. By ſtat. 8 & 9 *W.* 3. *c.* 11. In treſpaſs againſt ſever if any one or more is acquitted, he ſhall have his co againſt the plaintiff unleſs the judge ſhall certify upon t record, that there was good cauſe for making him a defe dant.

Dibden. v. Cook. 2 Stra. 1015. This ſtatute is confined to treſpaſs *vi et armis* only does not extend to treſpaſs on the caſe; for all ſtatu giving coſts are to be conſtrued ſtrictly, and caſe is mentioned.

3. By ſtat. 7 *Jac.* 1. *c.* 5. If treſpaſs *vi et armis* or be brought againſt any juſtice of peace, mayor, bailiff conſtable, for any thing done by virtue of their office they have a verdict, or plaintiff be non-ſuited or ſuffer

*P. 125. diſcontinuance, the defendant ſhall * have his double allowed by the judge who tried the cauſe.

This act has been conſtrued to extend to hinder ſheriffs and deputy conſtables, though not mentioned.

But the judge who tries the cauſe muſt order the *poſtea* to be marked for double coſts, for the court cannot do it after the trial. Anon. 2 Vent. 45.

That is the caſe where *there has been a trial or non-ſuit*, the ſuggeſtion that the defendant was an officer and the allowance of double coſts muſt *then* be made.

But where plaintiff *diſcontinued* by leave of the court upon an affidavit that the cauſe was againſt defendant for what he had done as a juſtice of peace, the court gave him a *rule to be Maſter to tax double coſts* which was made abſolute, for where plaintiff diſcontinues with leave of the court it is always in payment of coſts and that in this caſe is double coſts. Deveniſh. v. Martyn. Paſch. 1734. Bull. N. P. 332. 2 Stra. 958. S. C.

4. By ſtatute 21 *Jac.* 1. *c.* 12. The proviſions of this ſtatute are extended to church-wardens and overſeers of the poor.

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*CHAPTER IX. *P. 126.

THE ACTION OF EJECTMENT.

EJECTMENT is an action whereby a term of years recovered.

Ejectment is either on the title, or for non-payment of nt.

1. When in this action the right to lands and tenements tried, it is called *ejectment on the title*, and is done in this anner.

He who claims the land againſt him who is in poſſeſſion, ſuppoſed to make a leaſe for years to ſome fictitious per-, who is then ſuppoſed to be in poſſeſſion, until he is cted either by the tenant in poſſeſſion or by ſome fictitious rſon, who is called the caſual ejector, againſt him the fic-ous leſſee brings his action for the expulſion and he (the ual ejector) gives notice to the tenant in poſſeſſion to de-d his title to the lands, which thereby comes in iſſue, d if found for the plaintiff he is put into poſſeſſion.

2. *Ejectment*

*P. 127. *2. *Ejectment for non-payment of rent* was given by ſtatute 4 *Geo.* 2. *c.* 28. of which hereafter.

In treating of the action of ejectment I ſhall conſider it, 1ſt. With reference to the *things* for which it lies. 2dly. With reference to the perſon. 3d. Of ſerving the ejectment. 4th. The pleadings and evidence. 5th. The verdict and the other ſubſequent proceedings.

1ſt. OF EJECTMENT, WITH REFERENCE TO THE THINGS FOR WHICH IT LIES.

Under this head I ſhall conſider

For what things Ejectment lies.

Bull. N. P. 99. 1. "An ejectment will properly lie for nothing *of which* "*the ſheriff cannot deliver poſſeſſion* under an execution." Therefore incorporeal hereditaments, things lying merely in grant *quæ nec tangi nec videri poſſunt* are not properly objects of this action.

But to this rule there are exceptions.

Newman v. Holdmyfaſt. 1 Stra. 54. 1. For an ejectment will lie for *common appendant or appurtenant*, but not for *common pur cauſe de vicinage*; for the ſheriff by giving poſſeſſion of the land gives poſſeſſion of the common. But *common pur cauſe de vicinage* is a mere permiſſion.

*P. 128. Prieſt v. Wood. Cro. Car. 301. *2. It is enacted by ſtatute, 32 *H.* 8. *c.* 7. *ſ.* 7. "That "where any perſon ſhall have an eſtate of inheritance in "*tithes or other ſpiritual profits*, which ſhall be in lay hands "that he may maintain an ejectment or other action for "them."

Camell v. Clavering. 2 L. Raym. 789. This ſtatute confined the caſes of ejectment for tithes to *lay hands*, but it has ſince been extended to allow ejectment for tithes where they are in the hands of the clergy.

Goodtitle ex. dem. Cheſter. v. Alker & Elms. 1 Burr. 123. 2d. Ejectment will lie for land, which is part of the *king's highway* by the owner of the ſoil, for appropriating it to the uſe of the public, is not a deſertion of the property. But it ſhall be recovered ſubject to the eaſement.

* Norris v. Iſham. Hetley 80. *3. An ejectment for a *manor* generally is bad, without expreſſing the number of acres, for ſervices belong to a manor for which no ejectment can lie.

* Challoner v. Thomas. Yelv. 143. Cro. Car. 492. S. P. *4. An ejectment for a *water-courſe*, or *ſtream of water*, will, for it is fluctuating, and of which no poſſeſſion can be given. It ſhould be of *ſo much land covered with water.*

§ Sullivan v. Seagrave. Stra. 695. § 5. And an ejectment need not be for an entire thing, it will lie for the *third part of an houſe.*

‡ Hollingſworth v. Brewſter. Salk. 256. ‡ 6. Ejectment will lie for a *church.* But it muſt be demanded by the name of a meſſuage. In this caſe, it is ſaid the curate may have a rule to defend *quoad* a right of entry

* to perform divine ſervice, but that caſe has been over- *P. 129.
ruled.

2dly. *Of Ejectment for Non-payment of Rent.*

Ejectment for non-payment of rent was given by ſtatute 4 *Geo.* 2. *c.* 2. by which it is enacted, "That when half a "year's rent is in arrear, and no ſufficient diſtreſs to be had, "and the landlord hath by law a right of re-entry, he "may without any formal demand ſerve a declaration in "ejectment, or affix it to ſome notorious place on the houſe "or lands, and in caſe of judgment againſt the caſual ejec- "tor, or non-ſuit for not confeſſing leaſe, entry and ouſter, "plaintiff ſhall have judgment" under the following pro- viſos, 1ſt. "There muſt be an affidavit or proof at the trial "that there was half a year's rent in arrear, and no ſuffi- "cient diſtreſs to be had, and that leſſor had a right of en- "try. 2 Leſſee, or any one claiming under him, may "within ſix months after judgment and execution redeem "the premiſes by paying the rent and coſts, or may bring "a bill in equity, otherwiſe he will be barred for ever; "except as to bringing a writ of error, to reverſe the judg- "ment in ejectment. 3. If the premiſes had been mort- "gaged by leſſee, and mortgage not been in poſſeſſion, "mortgagee may within ſix calendar months after execu- "tion redeem the premiſes on paying the debt and coſts. "4. And if within the ſix calendar months defendant files "his bill in equity, he ſhall not have or continue an injunc- "tion, unleſs within * forty days after anſwer to his bill, *P. 130.
"he brings into court ſuch ſum as the plaintiff or leſſor "ſwears to be due, ſubject to the diſpoſal of the court. "And if the tenant ſhall have a decree on his bill, the leſ- "ſor ſhall be accountable only for what he really and *bona "fide* received out of the premiſes while in his poſſeſſion, "and if leſs than the rent, leſſee ſhall pay the remainder "before he is put into poſſeſſion. 5. But if defendant has "a verdict or the plaintiff be nonſuited, except for not con- "feſſing leaſe entry and ouſter, in ſuch caſe defendant ſhall "recover his full coſts. 6. But the tenant may at any time "before the trial pay into court the rent arrear and "coſts, and thereupon proceedings ſhall be ſtayed."

Under this ſtatute it has been held,

1ſt. "That where there has been a recovery in ejectment "under this ſtatute, that after poſſeſſion having been ac- "quieſced in, the court will preſume all the forms which "the ſtatute requires to have been rightly performed."

For where in ejectment the leſſor of the plaintiff had been Doe ex dim. Hitchings & al. v. Lewis. 1 Burr 614.
ſſee of the premiſes in queſtion and twenty years before ey had been recovered againſt him by the now defendant ho was leſſor: this ejectment was brought on the ground,

that the proceedings in the former ejectment had been under ſtat. 4 *Geo.* 2. *c.* 28. and that the judgment there given was by default, and that there did not appear that there had
*P. 131. been an affidavit then made by the * leſſor of the plaintiff that half a year's rent was then in arrear and no ſufficient diſtreſs to be had. But the court held, that the proceedings being ſtated to be under that ſtatute which requires an affidavit to that purpoſe, and the poſſeſſion having been ſo long acquieſced in, they would preſume all the proceedings to have been regular.

Downes v. Turner. Salk. 597.

2. It was formerly the practice in caſe of ejectments brought on an entry for non-payment of rent, to ſtay all proceedings on bringing the rent due into court.

" And it ſtill may be done, for the caſe of ſtay of pro-
" ceedings on paying the rent and coſts ſeems not to be
" confined to proceedings under the ſtatute."

Pure ex. dim. Withers v. Sturdy. Hill 1752. Bull. N. P. 97.

For where in ejectment by a landlord the tenant moved to ſtay proceedings upon payment of the rent arrear and coſts; on a rule to ſhew cauſe, it was inſiſted for the plaintiff that the caſe was not within the act, for that it was not an ejectment founded ſingly on the act, but that it was brought likewiſe on a clauſe of re-entry in the leaſe *for not repairing*, and the leaſe was produced in court. But the rule was made abſolute, with liberty for the plaintiff to proceed on any other title.

3. " Under the ſtatute the proceedings will be ſtayed on
" payment of rent and coſts, but if there has been a tender
" before ſervice of the ejectment, or ſuing out the writ, the
" proceedings are irregular, and will be ſet aſide for irregu-
" larity."

*P. 132. Goodright ex. dim. Stevenſon v. Noright. 2 Black. Rep. 746.

* As here where a tender of rent was made, but leſſor refuſed to accept of it, becauſe he had put the buſineſs into the hands of an attorney, and after proceeded in the ejectment, it was ſet aſide for irregularity.

2dly. OF EJECTMENT, WITH REFERENCE TO THE PERSON.

Under this head I ſhall conſider

1. *By whom in general Ejectment may be maintained.*

2. *By what perſons in particular.*

3 Black. Com. 206.

1. " It is a *general rule*, that no perſon can in any caſe
" bring an ejectment, unleſs he has in himſelf at the time
" *a right of entry*; for as he is ſuppoſed to have entered
" with a good title on the land, and made a good leaſe to
" his fictitious leſſee, the law will not ſuppoſe an entry made
" to make a leaſe, whereby the title is to be tried."

" Therefore

"Therefore where it happens, that the perſon claiming "title to the lands, has *no right of entry*, he cannot main- "tain this action."

As where the aſſignee of a bankrupt brought an eject- ment for part of the bankrupt's eſtate, *before the enrolment of the aſſignment of the bankrupt's eſtate made to him by the commiſſioners*, he was nonſuited. For the aſſignment is by bargain and ſale, which under ſtat. 27 *H.* 8. *c.* 16. is ordered to be enrolled within ſix months. And it is enacted by the ſtatutes 13 *Eliz. c.* 7. and 21 *Jac.* 1. *c.* 19. that all the bankrupt's lands, tenements, *&c.* ſhall be ſold by deed indented and *enrolled*; ſo that before the enrolling the aſſignees have no legal title. Elliot v. Danby. Caſ. K. B. 3. *P. 133.

But it is otherwiſe in the caſe of common bargain and ſale; for there the eſtate paſſes by the contract, and is executed by the ſtat. of *Uſes*. But the commiſſioners of bankrupt have only a power which ſhould be executed according to the ſtatute. Perry v. Bowers. Sir Thomas Jones 196.

So where tenant in tail makes a feoffment in fee, and thereby works a diſcontinuance and dies, the iſſue in tail cannot enter, and therefore cannot maintain this action: and the caſe is the ſame of other deſcents which toll entries. Litt. ſec. 595.

So where by common law, if the huſband ſeiſed in right of his wife had enfeoffed another and died, this was a diſcontinuance and took away her right of entry, ſo that ſhe could not maintain an ejectment, but this is now altered by ſtatute 32 *H.* 8. *c.* 28. which gives a right of entry to the wife, or her heirs, after the death of the huſband; ſo that ſhe may now ſupport this action. Litt. ſec. 594.

So by ſtat. 11 *H.* 7. *c.* 20. it is enacted, "That if any wo- "man having an eſtate in dower, or for life, or in tail jointly with her huſband, or ſolely to her own uſe, but * coming from him, ſhall alien, diſcontinue, *&c.* or ſuffer a recovery, ſuch ſhall be void; and the huſband's heir, or he who is entitled to the lands after her death may enter, and ſo may maintain this action." *P. 134.

2. But though a good and lawful title may, in fact, ſubſiſt in the plaintiff, yet he may be barred of his entry, and ſo of his power of recovering by this action, under the ſtatute 21 *Jac.* 1. *c.* 16. which enacts, "That no perſon ſhall make "an entry into lands, *&c.* but within *twenty years* after his "right and title ſhall firſt accrue, with the uſual ſavings for "infants, feme coverts, and perſons inſane, *&c.*

Therefore if the leſſor of the plaintiff is not able to prove himſelf or his anceſtors to have been in poſſeſſion within twenty years, before the action brought, he ſhall be nonſuited. Bull. N. P. 102.

Under this ſtatute it has been held,

1. That if a declaration in ejectment has been delivered within twenty years and a trial had, whereby leaſe entry and ouſter has been confeſſed, if the plaintiff has been non-ſuited Per Holt C. J. arg. Caſ. K. B. 573.

in that action and brings another ejectment *after the twenty years expired*, the former confeſſion of leaſe entry and ouſter ſhall not be ſufficient to ſave the running of the ſtatute againſt the plaintiff, for there muſt be an *actual entry within twenty years.*

2. "The poſſeſſion of the leſſor of the plaintiff within
*P. 135. "twenty years, which is neceſſary * to give him a title muſt
"be an *actual poſſeſſion* not a *preſumptive or implied one.*'

Rich ex dim. Lord Cullen v. Johnſon. 2 Stra. 1142.

Therefore in ejectment for *mines*, the leſſor of the plaintiff proved himſelf to be *lord of the manor* and that he was in poſſeſſion thereof. This was held to be inſufficient, for the mines are a diſtinct poſſeſſion and may be a different inheritance from the manor, and no entry was proved to have been made on them in this caſe within the twenty years.

S. C. Bull. N. P. 102.

So, alſo in the ſame caſe, *a verdict in an action of trover for lead dug out of the ſame mines* in favour of the leſſor of the plaintiff, was held to be not ſufficient evidence of poſſeſſion to ſupport this action; for trover may be brought *on property only without poſſeſſion.*

Stokes v. Berry. Salk. 421. 1 L. Raym. 741. S. C.

3. Proof of poſſeſſion within twenty years is not only neceſſary to ſupport the title of the leſſor of the plaintiff, but ſuch poſſeſſion for twenty years without interruption ſhall be a good title in itſelf, to recover in ejectment without any other. For an uninterrupted poſſeſſion for twenty years is like a deſcent which tolls an entry and gives a right of poſſeſſion which is ſufficient in ejectment. So that though the defendant be the perſon who has the legal right to the premiſes, yet he cannot juſtify ejecting the plaintiff who has had twenty years previous peaceable poſſeſſion.

4. "So the twenty years poſſeſſion which is ſufficient to
*P. 136. "bar the ejectment or to give * a title muſt be an *adverſe*
"*poſſeſſion*; for where it appears not to be adverſe, the ſta-
"tute of limitations does not run."

Reading v. Royſton. Salk. 423.

As where a man ſeiſed in fee having iſſue two daughters, deviſed his land to his grandſon by the elder daughter in fee, the elder daughter being dead, the grandſon died without iſſue, and the heir of the grandſon who was alſo heir to the father, and the heir of the other coparcener entered and took the profits of the land by *moieties* for above twenty years, ſuppoſing that the deviſe to the grandſon was void as to one moiety, but it being diſcovered that the deviſe was good and ſo that the heir of the grandſon had title to the *whole of the land*; he now brought an ejectment againſt the heir of the other coparcener, who had enjoyed the profits with him when it was objected, that he had by bringing the ejectment admitted himſelf to have been out of poſſeſſion for twenty years and ſo was barred; but it was reſolved, That the ſtatute of limitations never runs againſt a man *without an actual ouſter*, that here was no poſſeſſion whatever in the defendants, for the heir of the grandſon had the whole by deviſe, and the defendant was a mere ſtranger, and that whe
tw

two are in poſſeſſion the law will adjudge it to be in him who hath right; therefore as he never could have been in poſſeſſion there was no ouſter and the title of the leſſor of the plaintiff was good for the whole.

So where a man made a mortgage as a collateral ſecurity, though the *mortgagor* had * continued in poſſeſſion for above twenty years, yet the intereſt having been paid for that time, it was held that the mortgagee was not barred in bringing his ejectment, for there was no adverſe poſſeſſion, their titles being the ſame. Hatcher v. Fineux. L. Raym. 740. * P. 137.

So, alſo in ejectments, by *joint-tenants* the poſſeſſion of one joint-tenant is the poſſeſſion of another ſo as to prevent the ſtatute of limitation from running againſt the title of either. Ford v. Grey. Salk. 285.

Such alſo is the caſe of *tenants in common*, for there muſt be an ouſter and adverſe poſſeſſion by one proved in order to bar the other, or the poſſeſſion of one ſhall be held to be the poſſeſſion of the other; for the mere taking of all the profits is no ejectment, unleſs one drives off the cattle of the other or keeps him actually out after expulſion. Fairclam ex dim. of Empſon v. Shackleton. 5 Burr. 2604. Co. Litt. 195, 6.

" And as therefore an actual adverſe poſſeſſion is ſufficient " to give a title to one tenant in common againſt another, " what ſhall be deemed ſo, is proper matter to be left to " the jury."

For where the defendant's title in ejectment was a thirty-ſix years peaceable and *ſole* poſſeſſion of the lands, which he originally held as tenant in common with the leſſors of the plaintiff, and if the poſſeſſion was adverſe, the defendant had a ſufficient title. The court were of opinion that it was proper evidence to be left to the jury from the preſumption of ſo many years ſole poſſeſſion, whether there was not an actual ouſter and adverſe poſſeſſion. And the jury having found for * defendant in favour of the preſumption, a new trial was applied for and refuſed. Doe ex dim. Fiſher and Taylor v. Proſſer. Cowp. 217. * P. 138.

So in ejectment *by* tenants in common, an entry by one tenant in common ſhall be good for all, for he ſhall be ſuppoſed to enter according to his eſtate. Smales v. Dale. Hob. 120.

" For in general where two perſons claim by the ſame " title there ſhall be no adverſe poſſeſſion, ſo as to toll an " entry of the one, but the entry of the other be at all " times lawful." Co. Litt. 242.

As if a man dies ſeiſed in fee, leaving iſſue two ſons and the younger enters by abatement and dies leaving iſſue who enters on the land, in this caſe the eldeſt ſon his heir may enter at any time on the iſſue of the younger, for the younger ſon having entered on the land ſhall be preſumed *to have claimed it as heir to his father*, and the elder ſon or his heir claiming by the ſame title, his entry ſhall be lawful. Lit. 296, 297.

So

Page v. Selfby per Weſton Juſt. Suſſex 1680. Salk. MSS. Bull. N. P. 102.

So where defendant made title under the ſiſter of the leſſor of the plaintiff, as her heir, and proved that ſhe had enjoyed the lands for above twenty years, the court held it inſufficient. For her poſſeſſion would be conſtrued to be by courteſy and licence from her brother to preſerve the inheritance and not to make a diſheriſon. But if the brother had ever been in poſſeſſion and the ſiſter had ouſted him, this had been ſufficient after twenty years to have given a title to her heir.

*P. 139. *" Therefore where one party claims *under* or *through the* " *other* there ſhall be no adverſe poſſeſſion in ſuch caſe ſuffi- " cient to give a title."

Biſhop v. Edwards. per Powel Juſt. Bull. N. P. 103.

As if a cottage has been built in defiance of the lord and a quiet poſſeſſion had for twenty years, it is a good title within the ſtatute as againſt the lord; but if it was built at firſt with the lord's permiſſion or any acknowledgment had ſince been made (though it was one hundred years ſince) the ſtatute will not run againſt the lord, for the *poſſeſſion of a tenant at will for ever ſo many years* is no diſſeiſin, there muſt be a tortious ouſter.

" And wherever an adverſe poſſeſſion is relied on, it " ſeems that there ſhould be proof of an actual ouſter, for " preſumption of adverſe poſſeſſion from circumſtances ſhall " not be ſufficient."

1 Roll. Abr. 659. tit. diſſeiſin. Bull. N. P. 104.

As if defendant ſhould prove receipt of rent by a ſtranger it is no evidence of poſſeſſion, ſo as to take it out of him in whom the right is; nor even though he makes a leaſe to the tenant by indenture reſerving rent unleſs he has made an actual entry; and it is the ſame though the tenant declare that he is in poſſeſſion for the ſtranger, though it may be proper evidence to be left to a jury, eſpecially if the ſtranger has any colour of title.

Goodright ex dim. *P. 140.

And note, That where the ejectment is grounded on a clauſe in a leaſe giving a right *of re-entry for non-payment of rent, *actual entry* is there not neceſſary.

Hare v. Cator. Dougl 460.

2. *As to the particular perſons* who may maintain this action

1. " *The mortgagee* may maintain this action to obtain poſ- " ſeſſion of the mortgaged premiſes or eſtate."

" But a diſtinction is to be obſerved where the ejectment " is againſt the *tenant* of the lands *under a leaſe* made pri- " *or to the mortgage* and where againſt the mortgagor himſelf " againſt a *tenant* in poſſeſſion *under a leaſe* or demiſe made " *ſubſequent to the mortgage.*"

Per L. Mansfield. Dougl. 269. White v. Hawkins. quot. Doug. 23.

Where lands are let for years and afterwards mortgaged the tenant's poſſeſſion is protected and he cannot be turned out by the mortgagee: but the courts now permit the mortgagee to proceed by ejectment againſt the tenant in poſſeſſion *if he has given notice* to him before the action, *that he does not mean to diſturb his poſſeſſion*, but only requires the rent to be paid to him and not to the mortgagor.

B

But if the ejectment is againſt the mortgagee or his tenant under a leaſe made ſubſequent to the mortgage; in ſuch caſe the mortgagee may recover the premiſes abſolutely without any notice whatever to the tenant in poſſeſſion. For as by the mortgage the mortgagor becomes ſtrictly a mere tenant at will, no notice is ever given to him to quit; * he is not even entitled to the crop as other tenants at will are, becauſe all is liable to the debt, on payment of which all the mortgagee's title ceaſes. He therefore has no power either expreſs, or implied, of making leaſes not ſubject to every circumſtance of the mortgage. Under theſe circumſtances, therefore, he is at all times liable to be put out of poſſeſſion, without any notice or demand whatever. Keech. v. Hall. Dougl. 21. *P. 141.

And if the mortgagee aſſigns the mortgage, and the aſſignee aſſigns to another, *this laſt aſſignee may maintain an ejectment for the mortgaged premiſes.* For on the execution of the mortgage deed, the mortgagor becomes as tenant at will, and by the aſſignment, though he becomes tenant at ſufferance, yet his continuing in poſſeſſion can never make a diſſeiſin or diveſting of the term, and ſo an ejectment can well be maintained. Smartle v. Williams. Salk. 245.

But if after the day of payment elapſed, the mortgagee brings his ejectment, the court will ſtay proceedings, on payment of principal, intereſt, and coſts. Anon. 1 Stra. 413.

2. "*The deviſee of a term of years* may maintain ejectment to recover the term deviſed, but it is neceſſary to "ſhew the aſſent of the executors to the deviſe."

As where leſſee for years deviſed his term to his executor for life, paying 50*l.* to *J. S.* remainder to the leſſors of the plaintiff. The executor died, and his executrix poſſeſſed herſelf of the term; on ejectment being brought it * was held, that the executor took the term *as executor*, and ſo that the remainder over to the leſſors of the plaintiff was not executed, and that it was therefore incumbent on him to prove a ſpecial aſſent thereto as to a legacy. But upon proof of payment of the 50*l.* legacy, charged upon the term in the hands of the executor, that was held to be ſufficient proof of the aſſent, and plaintiff had a verdict. Young v. Holmes. 1 Stra. 70. *P. 142.

"But in the caſe of the deviſe of a *freehold*, the deviſee may immediately and without any poſſeſſion maintain an ejectment, for the lands deviſed. For after the teſtator's deceaſe the law caſts the freehold on the deviſee, and even ſhould the heir enter and die ſeiſed, and a deſcent be caſt, yet may the deviſee enter, and ſo maintain an ejectment; for otherwiſe he would be without remedy." Co. Litt. 240. b.

3d. *Conuſee of a ſtatute merchant* may bring an ejectment, but then he muſt prove a copy of the ſtatute, and *the returns of the capias ſi lacius, the extent & liberate.* Wood v. Palmer. Per Blencowe, at Dorcheſter, 1699.

For though by the return of the extent an intereſt veſts in the conuſee, yet the actual poſſeſſion is under the *liberate.*

And

Salk. MSS. Bull. N. P. 104. Hammond v. Wood. 2 Salk. 563. † Dougl. 456. Bull. N. P. 104. *P. 143. ‡Ld. Raym. 718. §Putten v. Purbeck. Salk. 563. ‖ Den. ex dim. Taylor v. Ld. Abingdon. Dougl 456. *Jemott v. Cowley. 1 Saund. 112. Sid. 223. S. C.

And without ſuch right of poſſeſſion this action is not maintainable.

†4. "*Tenant by elegit* may maintain this action to be put in "to poſſeſſion under the elegit."

But he ſhould prove the *judgment*, the *elegit* taken out on it, and *the inquiſition and return* *thereon, ‡by which the land in queſtion has been aſſigned to him. And it ſhould appear that the elegit had been lawfully executed; §for if more than a moiety has been extended, the execution is void, and an ejectment cannot be maintained on it, nor the poſſeſſion recovered on this title.

‖But in executing an elegit the ſheriff is not bound to deliver a moiety of each particular tenement and farm, but a valued moiety of the whole; for as he is to deliver poſſeſſion by metes and bounds, by ſuch means only can a complete execution be made.

*5. If a rent charge be granted to any one, with a proviſo that if the rent be in arrear that it ſhall be lawful for the grantee, his heirs and aſſigns, to enter and hold the lands out of which the rent charge is granted, till he ſhall be ſatisfied of the arrears, this ſhall give to the *grantee of ſuch rent charge* ſuch an intereſt, that he may maintain an ejectment for the lands; for the law does not give to any body an intereſt without a remedy, and if grantee has a right to hold ſuch poſſeſſion, he ought to have this action by which it may be gained.

Kocks v. Darſon. Hob. 215. Anon. Hutt. 16. *P. 144. Knipe v. Palmer. 2 Wilſ. 130. Nokes v. Windham. 1 Stra. 694. 2 Stra. 932. S. P. 7 H. 4. 6. b. 4 Co. 95. a. 2 Vent. 20.

6. *The committee of a lunatic* cannot bring an ejectment *in his own name* for the lands of the lunatic, it ſhould be in the name of the lunatic, for the intereſt and eſtate ſtill remain in the lunatic, and the committee is but as bailiff.

And for another reaſon, that the committee of a lunatic cannot make leaſes of the lunatic's * land, and ſo cannot make the neceſſary demiſe in ejectment.

7. *An infant* may maintain an ejectment, but he muſt name a good plaintiff, who may be anſwerable for the coſts.

8. *Executors* may maintain ejectment for land let to their teſtator for years, *if the teſtator is ouſted*, for by ſtat. 4 *Ed.* 4. *c.* 6. an action is given to executors for goods taken out of their teſtator's poſſeſſion, and the act extends to this caſe, becauſe the term itſelf is recovered.

4 Co. 95. a.

So if the *executors themſelves* of leſſee for years are ouſted they may either have a ſpecial writ on the caſe (*F. N. B.* 92. *Reg.* 97.) or maintain an ejectment.

Per Lord Hardwicke 2 Atk. 286.

So if the ſpiritual court grant an *adminiſtration pendente lite*, ſuch an *adminiſtrator* may maintain an ejectment.

Bull. N. P. 98.

9. When a *corporation aggregate* bring ejectment, they ſhould give a letter of attorney to ſome perſon to enter, and ſeal a leaſe on the land, for they cannot enter and demiſe on the land as natural perſons, and ſuch demiſe ſhould be declared on.

"But

" But it ſeems doubtful whether this now is neceſſary; at " all events it is cured by a verdict."

For where in ejectment the plaintiff declared on a demiſe by the aldermen and burgeſſes of *Bury*. But without ſetting out, *that the demiſe was by deed, or under the ſeal of the corporation.* On a writ of error brought this was aſſigned for error, but it was held to be well enough; for this being a fictitious action, the demiſe need not now be ſet out to be by deed. Patrick v. Balls. 1 L. Raym. 136. *P. 145.

" So *corporations ſole* may bring ejectment." Read v. Allen. Per Comyns, at Oxford, 1730.

As where the copyholders of a manor belonging to a biſhopric, during the vacancy of the ſee, committed a forfeiture by cutting timber, *the ſucceeding biſhop* was allowed to maintain an ejectment. Bull. N. P. 108.

10. If a *copyholder* is ejected by his lord, he can maintain an ejectment againſt him. For though he is called a tenant at will, yet it is according to the cuſtom of the manor, and the copyholder cannot be put out while he performs his ſervices. Litt. f. 77.

But in ſuch caſe it ſeems to be neceſſary that the copyholder is warranted to make leaſes either by the cuſtom of the manor, or by licence of the lord, in which caſe he may clearly have this action. Anon. 1 Leon. 4. Goodwin v. Longhurſt. Cro. Eliz. 535.

And even without a cuſtom to warrant ſuch leaſes, in the caſe of an ejectment, the copyholder could maintain this action againſt all perſons except the lord. Spark's caſe Cro. Eliz. 676.

‡So if *leſſee of copyholder* is ejected by a ſtranger he may have this action. Co. Copyh. ſect. 51.

*" So alſo *the lord* ſhall in this action recover the copy- " hold, where the copyholder has committed a forfeiture." *P. 146.

†And in ſuch caſe where the plaintiff makes title in the leſſor as lord of the manor, he ought to prove that his leſſor is lord, and the defendant a copyholder, and that he committed a forfeiture, but the preſentment of the forfeiture need not be proved, nor the entry, nor the ſeizure of the lord for the forfeiture. ‡Melwich v. Luter. 4 Co. 26. a. †Peters ex dim. Biſhop of Wincheſt. v. Mills. Per Tracy, Surry, 1707

§If the ejectment is brought againſt the leſſee for years of a copyholder (relying on the leaſe as a forfeiture) the plaintiff muſt prove an actual admittance of the copyholder, and it will not be ſufficient to prove the father admitted, and that he deſcended to the defendant's leſſor as ſon and heir, and that he had paid quit rents: for an actual admittance ſhould be proved, for nothing veſts in him before admittance and an actual entry, ſo that a leaſe made under thoſe circumſtances would be void, for a copyholder cannot make a leaſe before admittance, except to try a title. Bull. N. P. 107. §Bull. N. P. 107.

But if a copyhold is ſurrendered to one for life, remainder to another in fee, the admittance of the tenant for life is the admittance of him in remainder, though he himſelf never was admitted, for both make but one eſtate. Auncelm v. Auncelm. Cro. Jac. 31.

So

Jurden v. Stone. Hutt. 18. So where a widow is entitled to her freebench after the death of her husband, she may maintain an ejectment before admittance, for it cometh out of the husband's estate.

*P. 147. Wilson. Weddell. Yelv. 144. *But in the case of a *surrender*, no complete title vests in the surrenderee *till admittance*, for till then it remains in the surrenderor, and if he dies it is so much in him that his heir may maintain ejectment.

Holdfast ex dim. v. Clapham. Hill. 27 G. 3. Term. Rep. 600. But if a surrender is made, the admittance shall relate to that time, so that surrenderee may recover on a demise laid between the time of surrender and admittance.

3d. OF SERVING THE EJECTMENT.

Savage v. Dent. 2 Stra. 1064. 1. If it is known where the tenant lives, he should be *personally served* with the ejectment, if he does not live on the premises for which the ejectment is brought. And therefore in this case where the attorney for the plaintiff *knew where the defendant lived*, but did not serve him, it was held to be irregular.

S. C. Bull. N. P. So the words of statute 4 *Geo.* 2. *c.* 28. are "That the lessor may without any formal demand or re-entry *serve* a declaration in ejectment, or *in case the same cannot be legally served* or no tenant be in actual possession, then affix the same upon the door of any demised messuage, or in case there be no messuage, then upon some notorious place on the lands."

"In proceedings therefore under this statute, or at common law, the lessor of the plaintiff must proceed by personal service if possible."

*P. 148. Savage v. Dent. ante. *And therefore where the lessor of the plaintiff in this case proceeded, as if the possession was vacant, that is by sealing a lease as on a vacant possession, delivering an ejectment and signing judgment, and it appeared that at the time, though the lessee had quitted the house and removed his goods and family, yet that he had left some beer in the cellar, this was held to be such a possession as to make the proceedings which had been as if the possession had been vacant, irregular, and they were set aside.

Goodright ex dim. Waddington v. Thrustout. 2 Black. Rep. 800. 2. But if the tenant himself cannot be found, then service on a *wife* or *servant on the premises* shall be sufficient, if on the wife it is sufficient, but if the service is on the servant in that case there should be *some acknowledgment* from the tenant that he received it.

Anon. Salk. 255. As where the service was on a servant, and the tenant sent a letter to the lessor of the plaintiff's attorney acknowledging the receipt of it, and begged his interference, to prevent the plaintiff's lessor from proceeding.

3. "So in all cases where the tenant cannot personally be served, the court will by rule of court order particular services of the ejectment to be good, so as to give a good judgment to the plaintiff."

Knightly ex. dim. As where on affidavit that the tenant in possession had absconded, and that a declaration in ejectment had been served

on a perſon in the houſe, and another copy fixed to the pre- *P. 149.
miſes, the court thought it ſufficient ſervice, and made a Collins v.
rule on the tenant in poſſeſſion to ſhew cauſe why judgment Dunch. 2
ſhould not be entered up againſt the caſual ejector. Burr. 1106.

So where the rule was to ſhew cauſe why the ſervice of the Fenn ex.
ejectment which *had been made* upon a woman, who called dim.
herſelf *M. Campbell* (then in the houſe) ſhould not be deemed Tyrrel v.
good ſervice, and why the leſſors of the plaintiff ſhould not Denn.
be at liberty to enter up judgment againſt the caſual ejector. 2 Burr.
This rule was made abſolute on an affidavit, that *M. Camp-* 1181.
bell was either not at home or denied, but that a copy of the
rule was affixed to the door, and another thrown in at the
window.

So on affidavit that one *Hawkins* and his wife both kept Goodright
out of the way, to prevent their being ſerved with the eject- ex dim.
ment perſonally, a rule was made that ſervice on a ſervant Methold v.
in the houſe of *Hawkins* ſhould be ſufficient. Wright.
2 Burr.
§So leaving the ejectment at the houſe was ruled to be ſuf- 1161.
ficient ſervice, it appearing that the ſervant had refuſed to In marg.
receive it by order of his maſter. §Douglas v.

‡‡. "If there are ſeveral tenants of the premiſes, there 1 Stra. 755.
"muſt be a declaration in ejectment delivered to each of ‡Bull. N. P.
"them." 98.

And the perſon who ſwears to the ſervice of the ejectment, Lill. Pr.
muſt ſwear poſitively that ſuch a *one is tenant in poſſeſſion: Reg. 499.
That he red the indorſement to him, and acquainted him
with the contents thereof; and upon this affidavit the plain- *P. 150.
tiff moves for judgment againſt the caſual ejector, which is
granted unleſs the tenant enters into the uſual rule to con-
feſs leaſe, entry, and ouſter.

But in ſuch caſe, though the title is the ſame, the court Smith v.
will not conſolidate the declarations, and make one iſſue of Crabb.
them; for it would be making the plaintiff go on againſt all, 2 Stra. 1149.
when he might be ready in ſome of them only. And note.

5. If the declaration in ejectment is delivered before the eſſoign day of the iſſuable terms, the tenant is bound to plead within eight days in that term without further notice: but if the declaration is not ſerved before the eſſoign day of the other terms, the party is not bound to plead without notion made, and a rule obtained in theſe reſpective terms. And when the declaration was delivered after the eſſoign day of *Michaelmas* term. The plaintiff let that term paſs without doing any thing, and alſo *Hilary* term, till the laſt day, when he moved for a rule to plead, and for want of a plea, ſigned judgment: The court ſet it aſide, for when the plaintiff lets an whole term elapſe, he muſt give a new notice. Anon. Salk. 257.

6. By ſtat. 11 *Geo.* 2. *c.* 19. "The tenant muſt give notice "to his landlord of any declaration in ejectment ſerved on "him, under penalty of three years rent."

But

*P. 151. * But this ſtatute does not extend to caſes where the ejectment is brought by the *mortgagee* to be put into poſſeſſion of the mortgaged premiſes, without diſturbing the leſſee's poſſeſſion, but only to have his attornment. The ſtatute only extends to caſes where the ejectment is on a title adverſe to that of his landlord.

Buckley v. Buckley. East. 27 G. 3. Term Rep. 647.

Doe v. Roe ex dim. of Troughton 4 Burr. 1996.

And where the tenant had not given notice to his landlord of the ejectment, and there was judgment againſt the caſual ejector, the court ſet aſide the judgment, and ordered the tenant to pay all the coſts to the leſſor of the plaintiff on the landlord's entering into the uſual rule to try the title.

Jones v. Edwards. 2 Stra. 1241.

or the landlord may bring a writ of error, which will be a ſuperſedeas of the proceedings under the ſtat. 11 G. 2. and ſtay the proceedings.

After ſervice of the ejectment defendant ſhould, in caſe he means to defend the title, appear and confeſs leaſe entry and ouſter, which brings the title only into iſſue, after which the plaintiff is to declare.

4th. OF THE PLEADINGS *on the Part of the* PLAINTIFF.

1ſt. *With reſpect to the Things for which this Action lies.*

1ſt. "The declaration ſhould always be according to the
*P. 152. "plaintiff's title, and ſet it out * as it is, and ſhew a good
"and ſubſiſting one in him at the time of the ejectment
"brought."

Roe v. Williamſon. 2 Lev. 140.

For where leſſor of the plaintiff had but three years of leaſe to come, he made the demiſe in ejectment for *five* years and had a verdict. Judgment was arreſted, for the verdict term declared for is recovered, which here would be for a longer time than he was entitled to. *Sed Q.* of this caſe. Vid. poſt. pag. 158, *Bedford* v. *Dendien*.

"And therefore the demiſe by the leſſor of the plaintiff
"muſt always be laid *after his title has accrued.*"

Goodgain v. Wakefield. 1 Sid. 7. Macdonnel v. Welder. 1 Stra. 550.

For where the plaintiff declared, "That the ſaid *J.* (the leſſor of the plaintiff) on the 24th day of *June* had demiſed the premiſes to him, to hold *from* the ſaid 24th of *June*, by virtue of which on the day and year laſt mentioned he had entered." This was held to be bad, for, *from* being excluſive, the leaſe did not commence till the 25th of *June*, and ſo plaintiff had laid the commencement of his leaſe before his title accrued. But it would be good in replevin.

Baſſet v. Baſſet. 16 Dec. 1744. In Canc. Bull. N. P. 105.

But where the ejectment was brought by a poſthumous child, and the demiſe laid from the death of his father, Lord *Hardwicke* was of opinion that it was good, and that defendant was eſtopped to ſay, that leſſor of the plaintiff was not born at the time of the demiſe laid, by ſtat. 10 & 11 *W.* 3. *c.* 16.

* So where the anceſtor of the leſſor of the plaintiff, un- *P. 153.
der whom he derived, died at five o'clock in the morning of Roe ex dim.
the firſt of *January*, and the demiſe laid was on that day, it Wrangham
was inſiſted, that as the law admits no fraction of a day, v. Herſey.
that the eſtate for the whole day was in the leſſor of the 3 Wilſ. 274.
plaintiff's anceſtor, and ſo that leſſor himſelf had no title
to demiſe at the time laid in the declaration; but the objec-
tion was over-ruled, for the allowance of the fraction of a
day is a fiction in law, which never does wrong.

" But it is not neceſſary to lay any day certain upon which
plaintiff entered, it is ſufficient to lay a demiſe, and then
ſay in general, *that he afterwards entered.* For ſo are the
precedents."

And if the term demiſed to the plaintiff is expired, or Roe ex dim.
likely to expire, before trial, the court will upon motion en Lee v. Ellis.
large the term, though former practice would not allow it. 2 Black.
2d. " The declaration ſhould ſtate the ejectment by the Rep. 940.
defendant, as done, *ſubſequent to the date of the ſuppoſed* Salk. 257.
leaſe made to plaintiff by leſſor of the plaintiff. For other-
wiſe the ejectment, which is the injury complained of,
would precede the time of the accruing of the plaintiff's
title, and ſo there would be no cauſe of action."

But though this is the right and proper form of declaring,
as this being a fictitious action, it is not fatal if laid other-
wiſe. For * caſes have occurred in which the ejectment has *P. 154.
been laid prior in point of time to the demiſe, and yet the
court has held it to be good; that is, where the plaintiff de-
mures on a certain demiſe, and that defendant *afterwards*
ejected him, and then under the *ſciz.* mentions a day prior
to the demiſe, in which caſe the *ſciz.* being inconſiſtent with Bull. N. P.
the *afterwards*, ſhall be rejected as ſurpluſage. 106.

As where plaintiff in ejectment laid his leaſe on the 6th of Adams v.
September, 2 *Jac.* and that defendant, *poſtea ſciz. on the fourth* Gooſe.
September, 2 *Jac.* did eject him. Objection being taken Cro. Jac. 96.
on the ground of the ejectment being laid precedent to the
demiſe, the court nevertheleſs held the declaration good,
the time laid under the *ſciz.* being inconſiſtent and repug-
nant.

So where plaintiff in ejectment declared on a leaſed, *dated* Swimmer
Feb. 1742, to hold from the 8th of *January* before, and ex dim. v.
not *afterwards*, viz. *on the 28th of January* defendant had Groſvenor,
ejected him. It was inſiſted for the defendant, that the Bart. Salop.
ejectment was laid before the plaintiff's title under the leaſe, Aſſ. 1752.
which was not made till the firſt of *February*, and 1 *Sid.* 7. Bull. N. P.
is quoted. But the court held, that the day of the eject- 106.
ment being laid under a *videlicet*, was ſurpluſage, and ſhould
be rejected, and that *afterwards* ſhould relate to the time of
making the leaſe.

For the plaintiff in his declaration need mention *no par-* Merrell v.
ticular day of the ouſter, ſo that it appears to be before the Smith. Cro.
action Jac. 311.

*P. 155. action brought, and after * the term commenced; though in the precedents a certain day is always laid.

3. "These are cases of repugnancy before a trial, but a "verdict will cure almost all repugnancies, except such as "affect the *title*."

Small ex dim. Baker v. Cole & Skinner. 2 Burr. 1159. As where plaintiff declared on a lease made in *the thirty-third year of the reign of king George the Third*, which was an impossible time, the ejectment being *in the first year* of that king, plaintiff had a verdict, and this being moved in arrest of judgment, the court held it to be amendable.

"But if the fault goes to the title, or is in the process, "it is not amendable."

Goodtitle v. Meymot. 2 Stra. 1211. As where in the declaration delivered to the tenant in possession, the said *James* instead of *John* was said to enter by virtue of the demise. The court refused to amend it, for they considered it as process. And justice *Wright* cited a case of *Hill.* 15 *G.* 2. where the premises were laid to lie in *Twickenham* and *Isleworth*, *or one of them*, and the court refused to let the plaintiff amend, by striking out the disjunctive words.

4. "The declaration in ejectment should state a certain "*quantity*, *and the nature of the land* to be recovered; as "arable, pasture, *&c.*"

Ed. Savill's Case. 11 Co. 55. For where the ejectment was for a messuage and close containing three acres, and verdict for the plaintiff, the judgment was arrested, for it was not sufficient to state the

*P. 156. *quantity only*, * without also setting out the nature as arable meadow, *&c.*

"And so it is not sufficient to set out the *nature only*, with "out also setting out the *quantity*."

Holdfast v. Wright. Mich. 12 G. 1. C. B. Bull. N. P. 109. For where the ejectment was for a close of meadow, called *Partridge's Lees*, containing ten acres, more or less. It was held to be ill for not shewing the *precise quantity*.

† Knight v. Symes. Salk. 254. † And in like manner, where the ejectment was for five closes of arable and meadow, called ———, containing twenty acres in *D.* Upon not guilty pleaded, and verdict for the plaintiff, the judgment was arrested, because it was not shewn how much there was of one and how much the other.

"For an uncertainty in these respects in the declaration "is an incurable fault."

Burbury v. Yeomans. Sid. 295. Goodright ex dim. — Welsh v. Ford. 3 Wilf. 23. As where the ejectment was for seven messuages *or* tenements, the declaration was held to be ill, for the uncertainty of whether they were messuages or tenements. And though in a modern case the demise was so laid to be a messuage *or* tenement, and the court were well inclined to get over the objection, yet they held themselves bound by former decisions to adjudge the uncertainty to be incurable.

But if the ejectment was for one meſſuage or tenement, *called the Black Swan*, it had been * good, for the laſt words fix it to a ſufficient degree of certainty. Per Twiſden Juſt. 1 Sid. 295. *P. 157.

"But plaintiff is not bound to declare for the *exact quantity* which he has a right to recover."

"For he may declare for any indeterminate quantity, "and the form now uſed is ſo, *viz.* one thouſand acres of "paſture, *&c.* And he ſhall recover according to the "quantity to which he proves a title."

As where plaintiff declared in ejectment for one hundred acres of land, and ſhewed his leaſe in evidence, which was only of *forty* acres, and it was contended that he had failed in his caſe, for there was no ſuch leaſe as that on which he had declared: But it was ruled to be good for ſo much as was compriſed in the leaſe, and for the reſidue, that the jury might find him not guilty. Guy v. Rand. Cro. Eliz. 13.

So if the plaintiff declares for any thing, and proves a title to but a moiety, he ſhall only recover ſo much: as where it was for an houſe, and the proof only went to ſhew that part of it was built on the plaintiff's land by encroachment. He recovered ſo much as was ſo built on his land. 2 Roll. Ab. 704. Id. 719. Godwin v. Blackman. 3 Lev. 334.

But though plaintiff may thus recover in ejectment *leſs than he declares for*. Yet if he proves a title *to more* than he has declared for, yet he ſhall not recover it; for he can recover no more than he goes for in his declaration. Doe ex dim. Burgeſs v. Purvis & al. Burr. 326.

* "So though plaintiff declares for *a time longer than he has a right to recover*, yet he ſhall recover according to what his title really is." *P. 158.

For where plaintiff declared on a leaſe for ſeven years from the 25th of *March*, 1765. In proof it appeared that *S.* who was ſeiſed in fee, had demiſed the premiſes in queſtion for ſeven years to *D.* in 1763, and that he in 1764 had aſſigned the unexpired reſidue of his term to *Carruthers*, that if he recovered in this action, under this demiſe, he muſt recover for two years longer than he had a title. But per Lord *Mansfield*, if the leſſor of the plaintiff has a title though but for a week, he ought to recover it, for the true queſtion in ejectment is, who has the poſſeſſory right. And therefore in this caſe plaintiff ſhould recover accordingly. Bedford ex dim. Carruthers v. Dendien. Sittings after Trin. 5 G. 3. Bull. N. P. 106.

†. "But a very exact deſcription of the nature of the land is not required, and greater latitude is now admitted than formerly. Becauſe the leſſor of the plaintiff is to *ſhew the lands* to the ſheriff, and to take poſſeſſion of them at his peril." 1 Burr. 629.

Therefore deſcriptions of certain kinds of land of local nature have been held to be good.

As where it was for one hundred acres of *mountain* in *Ireland*. It was held to be good. Lord Kildare v. Fiſher. 1 Stra. 71.

So for *bog* in the ſame kingdom. † Ibid.

So for *alder carr* in *Norfolk*. ‡ Barns v. Peterſon.

And in many other inſtances. 2 Stra. 1063.

6th. In

*P. 159. Sir Henry Harpur's Caſe. 11 Co. 25. b. Swadling v. Peers. Cro. Jac. 613. Angel v. Rolfe. 2 Keb. 376.

* 6th. In ejectment for *tithes*, under ſtatute 32 *H* 8. it is not ſufficient to declare *for all and every kind of tithes* in ſuch a pariſh, it ſhould ſpecify *the particular nature and quality*, as of hay, wool, &c. In like manner as in declaring for land, it is neceſſary to ſhew the quality, for the words of the ſtatute are to that effect.

" So the ejectment ſhould ſtate the demiſe to have been " made by *deed*."

For where the ejectment was for tithes, not ſaying by deed, the judgment was reverſed.

2dly, *With reſpect to the perſons who may maintain this action.*

1. " If the declaration ſtates the demiſe to the plaintiff to " be of ſeveral leſſors, it muſt appear that each had a title " *to the whole* of the land or premiſes demiſed, or the decla- " ration will be bad. For if one has not an intereſt in the " whole, he cannot be ſaid to demiſe it."

Treport's Caſe. 6 Co. 14. b. King v. Berry. Poph. 57. S. P.

1. Therefore where in ejectment the plaintiff declared on a leaſe made by *A.* & *B.* and on *not guilty* pleaded, the jury found a ſpecial verdict, *That* A. *was tenant for life* of the lands in queſtion, and *B. had the remainder in fee*, and that *A.* was living. On this finding, it was adjudged againſt the plaintiff, for it was not the leaſe of *A.* and *B.* but the leaſe of A. *during his life, and the confirmation of* B.

*P. 160. Mantle v. Wollington. Cro. Jac. 166. Co. Litt. 200. a. Heatherly ex dim. —— Worthington v. Weſton. 2 Wilſ. 232. S. P. § Moore v. Furſden. Show. 342. Morris v. Barry. 2 Stra. 1181. 1 Wilſ. 1. S. C. ‖ Boner v. Juner. 1 Ld. Raym. 726. 2 Keb. 700. † Wiſcot's Caſe. 2 Co. 61. ‡ Wells v. Partridge. Cro. Eliz. 469. 717.

* 2. Therefore, on the ſame principle, if *tenants in common join in a leaſe of their land* to bring an ejectment, it will be bad. For they are in by ſeveral titles, and therefore the freehold is ſeveral, and conſequently each cannot demiſe the whole. So that there ſhould be a *diſtinct count on the demiſe of each*, or they may join in a leaſe to a third perſon, and ſuch perſon may make a leaſe to try the title.

§ But *joint tenants* may join in a leaſe to try the title in ejectment, for being ſeiſed *per my et per tout*, each has a title to the whole, and ſo his demiſe of it is good.

‖ And for the ſame reaſon *co-parceners* may join in a leaſe to the plaintiff in ejectment; but the uſual mode is to join in a leaſe to a third perſon, who demiſes to the plaintiff; for a demiſe of all the parts is a demiſe of the whole.

† 3. *Huſband and wife* may join in a leaſe to the plaintiff in ejectment, without ſaying that it was by deed, though formerly held to be neceſſary.

‡ 4. Where the leſſor of the plaintiff claims by leaſe under a *copyholder*, he muſt ſhew, that by the cuſtom of the manor, that the copyholder may let ſuch leaſes for years. And if this be not ſet out in the declaration, and the count be granted, it ſhall be eſteemed a leaſe at common law, which a copyholder cannot make.

*5. If plaintiff declares as *adminiſtrator* he may declare generally that adminiſtration was granted by the biſhop of —, without ſaying that he was ordinary, or had the right of granting adminiſtration. *P. 161. Dorrell v. Collins. Cro. Eliz. 6.

2d. OF THE PLEADINGS *on the Part of the* DEFENDANT.

1. "The tenant in poſſeſſion muſt apply to the court to "be made defendant, in the room of the caſual ejector. "This is done by rule of court, on condition of his confeſſing leaſe entry and ouſter."

But if the defendant does not appear at the trial and confeſs leaſe entry and ouſter, the plaintiff muſt be non-ſuited; as he cannot *prove* any of theſe requiſites; and then upon return of the poſtea, judgment is given againſt the caſual ejector, and it is indorſed on the poſtea that the nonſuit was, *for not confeſſing leaſe entry and ouſter*. Upon this plaintiff is entitled to have his coſts taxed againſt the defendant, and if they are not paid, an attachment will go. Turner v. Barnaby. Salk. 259.

If there are ſeveral defendants, and ſome of them do not appear and confeſs leaſe entry and ouſter, a verdict will be taken for them, and then plaintiff ſhall have judgment againſt the caſual ejector for the lands of which theſe defendants were in poſſeſſion. Claxmore v. Searle. 1 Lord Raym. 729. Ellis v. Knowles. 1 Barnes. 118.

*2. Where the ejectment is for lands, *which have been paſſed by a fine*, the confeſſion of leaſe entry and ouſter by the tenant is not ſufficient, the leſſor of the plaintiff muſt make an *actual entry*, and ordering one to deliver a declaration in ejectment to the tenant in poſſeſſion will not amount to an entry ſufficient. *P. 162. 3 Burr. 1897. Jenkin v. Prichard.

†Therefore where to avoid a fine, leſſor of the plaintiff made an entry, but having brought his ejectment, he laid the demiſe *three months before his entry*. It was adjudged that an actual entry being neceſſary to avoid a fine, and give him title, and he having laid the demiſe *before his entry*, that he had *then* no title, and ſo could not recover. Mich. 30 G. 2. C. B. Bull. N. P. 103. †Berringt. v. Parkhurſt.

But where leſſor of the plaintiff made an actual entry on the lands in *September*, 1744, and laid his demiſe in ejectment in *October* of the ſame year, though a fine was levied *by the defendant* of theſe lands *in Eaſter term*, 1745. It was adjudged that the entry being *precedent to the fine*, that it was ſufficient to enable leſſor of the plaintiff to make a leaſe to try the title. 2 Stra. 1086. Muſgrave ex dim. Hilton v. Sir John Shelly. 1 Wilſ. 214.

"In other caſes the confeſſion of leaſe entry and ouſter is "ſufficient, as if the ejectment is brought for *a condition* "*broken*, it is ſufficient." 3 Burr. 1897.

For where the ejectment was brought by the leſſor againſt the leſſee, on a condition of *re-entry for non-payment of rent*, proof of an actual entry and ouſter was held to be not neceſſary. Little v. Heaton. Salk. 259. Dougl. 460.

*P. 163. *So where the ejectment was by *one tenant in common against another*, proof of an actual ouſter was held to be not neceſſary, and that the confeſſion of leaſe, entry and ouſter was ſufficient to prevent a non-ſuit.

Oates ex dim. Wigfall. v. Brydon. 3 Burr. 1895.

But in the caſe of tenants in common if in fact there has been no actual ouſter, the defendant ought to apply to the court not to compel him to confeſs, or permit him to do it ſpecially; which the court will do, where it is only matter of account, and the only ouſter is by pernancy of the profits, without an actual obſtruction of the other to occupy.

S. C. Buller N. P. 109.

And the levying a fine by one jointtenant is not an ouſter of his companion.

Ford v. Gray. Salk. 286. 5 Reſ.

In delivering the opinion of the court in *Goodright* v *Cater*, *Dougl.* 468, Lord *Mansfield* ſays, that in the caſe of *a fine only*, is an actual entry neceſſary to be proved. But the reporter makes a quære, and that the doctrine is contrary to Lord *Mansfield's* own doctrine in *Burr.* 1897, where he mentions, that an actual entry is neceſſary *to prevent the operation of the ſtatute of limitations*; and *Dormer* v. *Forteſcue* in *Dom. Proc.* is there given as the authority. So that it ſeems an actual entry in the caſe of the ſtatute of limitations is neceſſary.

Bull. N. P. Edit. 1775. 102. quot. Dougl. 468. as an authority.

By ſtat. 4 *Ann. c.* 16. *ſ.* 16. it is further enacted, "That "no claim or entry ſhall be ſufficient to avoid a fine levied "with proclamations, unleſs the action be commenced with- "in one year after making ſuch entry or claim. And to "avoid the ſtatute of limitations, unleſs the * action has "been commenced within the ſame time."

*P. 164.

And as to *what ſhall be a ſufficient entry*, it has been decided.

Anon. Skin. 412.

1. That in this caſe, where a fine had been levied, the leſſor of plaintiff proved that he had gone to the houſe in queſtion, and at the gate ſaid to the tenant, that he was heir of the houſe and land, and forbad him to pay any more rent to the defendant, but *that he had not entered the houſe*, when he made the demand. On which it was agreed that *the claim at the gate without entering the houſe* was inſufficient. Then it was proved that there was a court before the houſe, and which belonged to it, and that though the claim was at the gate, yet that *it was on the land, and not in the ſtreet*, and that was holden to be a good entry, and clearly to ſupport the ejectment.

Fitchet v. Adams. 2 Stra. 1128.

2. So where a *ſtranger made an entry* on the premiſes, on behalf of the leſſor of the plaintiff, but *without any authority from him* at that time, claiming from him under a will, but the *leſſor of the plaintiff aſſented to it before the day laid in the demiſe*; the court were clearly of opinion that the entry was ſufficient to ſupport the ejectment, brought on the title, the ſubſequent aſſent having eſtabliſhed the validity of the firſt entry.

3. Ie

3. It is enacted by ſtatute 21 *Geo.* 2. *c.* 19. "That where "an ejectment is ſerved on the *tenant, that *the landlord may* *P. 165.
"*by leave of the court make himſelf defendant with the tenant* "*in poſſeſſion,* in caſe he appears: But in caſe the tenant "will not appear, judgment ſhall be ſigned againſt the ca- "ſual ejector. But upon the landlord's entering into the "common rule, as the tenant ought to have done, the court "will order a ſtay of execution upon ſuch judgment till fur- "ther order."

Under this ſtatute, it has been reſolved,

1ſt. "That the landlord has under the ſtatute *a right* to "be made a defendant if he applies, but it is optional in "him to do ſo or not."

For where the plaintiff moved, that the landlord might be joined as a co-defendant with the tenant in poſſeſſion, the court refuſed the motion, on the ground that they could not do it without his requeſt. Underhill v. Durham. Salk. 256.

And in another caſe, where the landlord moved to be made a defendant, the plaintiff oppoſed it on the ground that the landlord was a member of parliament. But per *Holt*, he muſt be joined, and we cannot compel him to waive his privilege. Ibid.

2. "No one can be admitted as a defendant under the "ſtatute, unleſs he is the *actual landlord*, or one who has "been in poſſeſſion. For this might encourage mainte- "nance."

* Therefore where a man deviſed his eſtate to *J. S.* and the heir brought his action of ejectment againſt the tenant, *J. S.* (*the deviſee*) applied to be admitted a defendant, and was refuſed, for he was not actual landlord. *P. 166. Roe ex dim. Leake v. Doe.

§ So a *mortgagee*, who had never been in poſſeſſion or received the rents, has been refuſed to be made a defendant. Mich. 29 G. 2. C. B. Bull. N. P. 95.

And in caſes *of vacant poſſeſſion* no perſon claiming title will be let in to defend, but he that can firſt ſeal a leaſe on the premiſes muſt obtain poſſeſſion. §Jones ex dim. Woodw. v. Williams.

"But this rule is not to be extended farther than to pre- vent *mere ſtrangers* from being admitted as defendants."

†Therefore a *purchaſer of a reverſion*, which ſeemed to be a pretended title, and where no rent had ever been paid, was held to be inadmiſſible as a defendant. Trin. 13 G. 2. Bull. N. P. 95.

‡But in this caſe, which was a diſputed title between the crown *by eſcheat* and the heir, neither of whom had been in poſſeſſion, the court reſolved, that the title ſhould be tried, and ordered the ejectment to be brought by the lord by eſcheat, and that the heir ſhould be admitted to defend either alone or with the tenant in poſſeſſion. 1 Barnes. 122. †Doe ex dim. James v. Roe. Hill. 1761. quot. 3 Bur. 1291.

4. Though the defendant confeſſes leaſe entry and ouſter, yet he may deny that he is in poſſeſſion of the premiſes, for

‡Fairclaim ex. dim. Fowler v. Shamtitle.

*P. 167. 3 Burr. 1290. 1 Black. Rep. 357. S. C. §Smith ex. dim. Taylor v. Mann. 1 Wilſ. 220. Bull. N. P. 10. ‡ S. C. †Doe ex dim. Jeſſe v. Bacchus. M. 30 G. 2 at Sittings. Bull. N. P. 110. ‖Fenwick' Caſe. Salk. 257. †Alden's Caſe. 5 Co. 105. a. ‡Barker v. Wick. Salk. 56. *P. 168. Brittle v. Dade. Salk. 185. Doe ex dim. Ruſt v. Roe. 2 Burr. 1046. Hatch v. Cannon. 3 Wilſ. 51.

*which the plaintiff goes and put the plaintiff §upon proving it, and if he cannot, he ſhall be non-ſuited.

‡And where the landlord has been admitted as defendant, the plaintiff muſt prove that the defendant or his tenants are in poſſeſſion of the premiſes in queſtion. For the rule is, that the landlord ſhall defend for the premiſes only, whereof his tenants are in poſſeſſion, and the party does not admit himſelf landlord of any premiſes which the plaintiff may make title to, but to ſuch only as were in poſſeſſion of his tenants.

†But it has been ſaid, that if there be but one defendant as tenant in poſſeſſion, that the plaintiff need not prove him in poſſeſſion, becauſe if he was not why did he enter into the rule.

‖So it is ſaid in this caſe, that where the huſband is leſſor of the plaintiff, that the wife may be made a defendant in ejectment. As where the plaintiff's title was by a pretended intermarriage, which was controverted.

2dly. I ſhall now conſider more particularly certain *pleas* which are good in this action.

†1ſt. "That the lands for which the ejectment is brought "are *ancient demeſne*, is a good plea in abatement."

‡But the plea muſt ſtate, that the lands are held of ſuch a manor, which is ancient demeſne, not that *they are parcel* of the manor. * For though the manor is ancient demeſne, yet the manor and the demeſnes of the manor are impleadable in the king's courts and at common law, and not in the lord's courts, for that would be to make the lord judge in his own cauſe. But lands *held of a manor*, which is ancient demeſne, are impleadable in the court of ancient demeſne and there only. *F. N. B.* 11 *m.* 1 *Roll.* 324.

Therefore if the lands are *copyhold* and ancient demeſne the ejectment for them muſt be tried at common law; for copyhold lands cannot be *held of a manor*, but muſt be *parcel of it*.

"So the plea ſhould ſtate the *manor to be ancient demeſne*."

For where in this caſe the affidavit on which the plea was grounded, only ſtated, "That the lands ſtated in the declaration were ancient demeſne, and held of the manor of *Godmancheſter*," without ſaying that the manor was ancient demeſne, it was adjudged to be bad and inſufficient. For this plea being to ouſt the courts above of juriſdiction, it can only be done by ſhewing another which has, and that by ſtating the manor to be ancient demeſne. Beſides the eſtate of the leſſor of the plaintiff ſhould appear, for if he has only a *term*, he cannot ſue in the courts of *ancient demeſne*.

But this being a dilatory plea to the juriſdiction of the court muſt always be verified by affidavit.

2

* 2. If the plaintiff after iſſue and before trial *enters into part of the lands in diſpute*, the defendant may at the aſſizes plead this as a plea *puis darreign continuance*, in bar of plaintiff's action: But it is at the diſcretion of the judges if they will admit it; but if they do, it ſtops the trial, and the plaintiff is not to reply to it at the aſſizes, but the judge is to return it as parcel of the record of *Niſi Prius*. * P. 169. Moor v. Hawkins. Yelv. 180.

3. *Accord and ſatisfaction* is a good plea in ejectment. Henry Peytoe's Caſe. 9 Co. 77. b.

† For ejectment ſuppoſes a treſpaſs, and they are ſo interwoven, that they cannot be ſevered, and in all actions which ſuppoſe a wrong *vi et armis*, and where a capias and exigent lay, accord is a good plea. † Brownl. 128. S. C.

4. General eſtates in fee ſimple may be generally pleaded, but the commencement of eſtates tail, and other particular eſtates, ought to be ſhewn, unleſs where alledged only by way of inducement. So the life of tenant in tail or for life ought to be averred. Co. Litt. 303. b.

As where to treſpaſs for ſpoiling plaintiff's graſs, defendant juſtified, and derived his title under one *Knight*, *who was lawfully entitled to the remainder of a term for ninety-nine years*, without ſaying any thing more or how derived out of the fee: The plea on ſpecial demurrer was held to be bad. John's v. Whitley. 3 Wilſ. 65. Scilly v. Dally. Salk. 562. S. P.

So no one can in pleading make title to a copyhold, unleſs he ſhews a grant thereof, it * is not ſufficient to ſay, "that ſuch a one was ſeiſed in fee or in tail, *&c.*" Shepherd's Caſe. Cro. Car. 137.

Note, If judgment in ejectment be ſigned in a country cauſe for want of a plea, but no poſſeſſion delivered, a judge at his chambers, at any time before the aſſizes, may compel the plaintiff to accept of a plea, but if poſſeſſion has been delivered, he is without remedy. * P. 170. Anon. Salk. 516.

OF THE EVIDENCE.

As in this action each party claims *a title* to the lands, I ſhall conſider

The Evidence for the Plaintiff and Defendant together.

1. "In ejectment the plaintiff muſt recover by the ſtrength "of his own title, not by the weakneſs of his adverſary's, "for whom poſſeſſion is a good title. The plaintiff muſt "therefore always ſhew *a good and ſufficient title in himſelf*, "or he cannot recover."

Therefore where in an ejectment under two ſeveral demiſes, a witneſs for the plaintiff proved that one of the leſſors of the plaintiff had aſſigned all his intereſt in the premiſes to the other by a deed then in court, but the plaintiff refuſed to produce his deed, upon which a non-ſuit took place; for by this evidence all title was taken away from one of the leſſors of the plaintiff, and there was no proof of the conveyance to the other, and ſo no proof of any title in him. Roe ex dim. Haldane and Urry v. Harvey. 4 Burr. 2484.

"So

*P. 171. * " So that it will be ſufficient for the defendant in eject-
Bull. N. P. " ment to prove *a title out of the leſſor of the plaintiff*, though
100. " he can prove no title in himſelf; but if he proves one out
" of the leſſor of the plaintiff, it muſt be a good and a ſub-
" ſiſting one elſewhere."

Ibid. As if defendant was to produce an old leaſe of one thouſand years to another of the lands in queſtion, that alone
Ante. would not be ſufficient, unleſs he proved poſſeſſion under ſuch leaſe, within twenty years, for that time is of itſelf a title to defendant.

Wilſon v. Witherby. 8 Ann. in Kent. Per Holt. Bull. N. P. 110. So if defendant produces an old mortgage deed, whereon intereſt has not been paid, nor mortgagee entered, againſt the title of the leſſor of the plaintiff, who claims under the mortgagor, this will not be ſufficient to defeat the leſſor of the plaintiff, becauſe that no intereſt appearing to be paid, the court will preſume that the mortgage was ſatisfied: But if the defendant can prove payment of intereſt upon ſuch mortgage after the time of redemption, and within twenty years, it will be ſufficient to non-ſuit the plaintiff.

Farmer ex dim. Earl v. Rogers. 2 Wilſ. 26. Bull. N. P. 110. S. C. So where the defendant produced a mortgage deed for years of the anceſtor of the leſſor of the plaintiff, upon which was this indorſement, " Received from Mrs. *M. O.* 500*l.* on the within written mortgage; and I do hereby releaſe to the ſaid *M. O.* and diſcharge the mortgaged premiſes of the ſaid term of five hundred years."—On a caſe
*P. 172. reſerved, the court were of opinion, 1ſt, That * theſe words amounted to a ſurrender. 2dly, That ſuch ſurrender might be by note in writing, within the ſtatute of frauds; and, 3dly, That ſuch note in writing was not required to be ſtamped. The courts therefore held, that the defendant ſhewed no ſubſiſting title againſt the leſſor of the plaintiff under this deed, and the plaintiff therefore recovered.

Buller N. P. 112. " And though leſſor of the plaintiff in ejectment muſt
" ſhew a good and ſubſiſting title in himſelf, yet in the caſe
" of *Lade*, bart. v. *Holford*, *Paſch.* 3 *Geo.* 3. B. R. Lord
" *Mansfield* declared, that he and many of the judges had
" reſolved never to ſuffer a plaintiff in ejectment to be non-
" ſuited, *by a term ſtanding out in his own truſtee*, or *by the*
" *ſetting up of a ſatisfied term by the mortgagee againſt the*
" *mortgagor*, but that he would direct the jury to preſume it
" to have been ſurrendered."

" And where ſeveral matters are neceſſary to give a com-
" plete title, plaintiff muſt prove all thoſe requiſites."

Harris v. Stroud. Latch. 62. Therefore where in an ejectment for a rectory, and plaintiff proved the *taking of the tithes* only, but not an entry into the glebe, he was non-ſuited.

Snow v. Philips. 1 Sid. 220. For if an ejectment is brought for a rectory, the plaintiff ought to prove that his leſſor was *admitted*, *inſtituted*, *and inducted*, and *had read and ſubſcribed the thirty nine articles* and *had declared his aſſent and conſent to all things contained*

* *in the book of Common Prayer.* But he need not prove a *title in his patron*; for inſtitution and induction on the preſentation of a ſtranger is ſufficient to bar him, who has right in ejectment, and put the rightful patron to his *quare impedit.* * P. 173.

So he muſt alſo prove *preſentation,* and inſtitution alone is not ſufficient evidence of preſentation, though it was recited in the letters of preſentation, eſpecially if induction and poſſeſſion has not followed. Heath v. Prynn. 1 Vent. 14. 1 Sid. 426. S. C.

But quære, if proof of a *verbal preſentation* would not be ſufficient. Bull. N. P. 105.

However where the plaintiff derived under an old leaſe for one thouſand years, made the 5th of *Eliz.* he produced the original leaſe, and proved poſſeſſion in himſelf, and thoſe under whom he claimed ſince 6th of *Ann.* and proved one meſne aſſignment in the 16 *Jac.* 1. The plaintiff was non-ſuited at the trial for want of proving all the aſſignments, but the court ſet the non-ſuit aſide, holding that the meſne aſſignments ſhould be preſumed after ſo long a poſſeſſion. Earl ex dim. Goodwin v. Baxter. 2 Blackſt. Rep. 1228.

2. "This being an action of treſpaſs every part of the "declaration muſt be proved."

For where plaintiff declared in ejectment for an houſe in *Peter's-ſtreet* and *Ward of Cheap,* and defendant proved, that the houſe was in the *Ward of Farringdon,* and that no part of * *Peter's-ſtreet* was in the *Ward of Cheap,* the plaintiff was non-ſuited. Body v. Smith. 1 Str. 595. * P. 174.

"But if plaintiff declares on a leaſe of a certain date, "though his proof does not eſtabliſh that leaſe as declared "on, yet if he proves *a good and ſubſiſting leaſe at the time,* "it ſhall be ſufficient."

As where the declaration was of a leaſe *made the 14th of January,* 30 *of Eliz* and the evidence was a leaſe ſealed *the 13th* of the ſame year, the evidence was held to be good, for if it was a leaſe ſealed the 13th, it was a good leaſe on the 14th. Force v. Foſter. 4 Leon. 14.

3. "*Leaſes at will* exiſt now only notionally, and now all "leaſes are deemed to be from *year to year,* and cannot be "determined without reaſonable *notice,* which may be done "by either party." Per Lord Mansfield. 3 Burr. 1609.

All leaſes for uncertain terms are *prima facie* leaſes at will, and it is the reſervation of an annual rent that turns them into leaſes from year to year. It is poſſible that circumſtances may make them leaſes for a longer time, as where the crop (liquorice or madder for example) does not come to perfection for leſs than two years; and perhaps the nature of the ground and courſe of huſbandry may deſerve to be conſidered. Per De Grey, C. J. 2 Black. Rep. 1173.

But though a cuſtom is proved to exiſt where the lands lie, that *where any part of the lands are open fields,* that that ſhall give the tenant a right to hold for three years, yet where there Roe ex dim. Bree v. Lees 2 Black. Rep. 1171.

*P. 175. * there is an indeterminate taking, this cuſtom ſhall not control it. The rule now laid down for ſuch an indeterminate demiſe, is always a taking from year to year, and the cuſtom is unreaſonable, for ſo by the tenant's having one acre of common field, might he determine the tenure of one hundred acres held in ſeveralty.

2. As to the *time of the notice* it is ſettled that

Parker ex dim. Walker v. Conſtable. 3 Wilſ. 25. Wherever therefore the landlord brings ejectment for lands ſo demiſed at will, he muſt prove "*That half a year's previous notice was given to tenant to quit*, or to his executor, in caſe of his death," or the plaintiff ſhall be non-ſuited at the trial.

"And the leſſor cannot determine his will at any time, "but muſt determine it *at the end of the year*."

Right ex dim. Flower v. Darby. Paſch. 26 G. 3. B. R. Term. Rep. 139. For the ſix months notice to quit muſt be given at the end and expiration of the firſt ſix months, ſo that the notice muſt be to quit at the end of the year.

3. "As to the *form* of the notice this caſe occurred."

† Doe ex dim. Matthews v. Jackſon. Dougl. 167. † The notice ſerved on the tenant was in writing, and in the following words, "I deſire you to quit poſſeſſion on *Lady-day* next, or *I ſhall inſiſt upon double rent*." It was inſiſted that this was not a good notice, as not being poſitive, but leaving an option in the tenant to pay the double rent. But the court held it to be ſufficiently poſitive, and that the latter * words only were added by way of threat of the conſequence of holding over the poſſeſſion; but that had the words been "*or elſe* I ſhall inſiſt on double rent," there the tenant would have had an option, and the notice not have been ſufficient.

*P. 176.

Throgmorton v. Whelpdale. Hil. 9 G. 3. B. R. Bull. N. P. 96. But where the tenant has attorned to ſome other perſon or done ſome other act, diſclaiming to hold as tenant to the landlord, in ſuch caſe no notice is neceſſary.

4. "It often happens that after a notice to quit has been "regularly ſerved on the tenant, that the landlord does "ſome act which amounts to a *waiver of this notice*."

As to which it has been ſettled,

Doe ex dim. Cheney v. Batten. Cowp. 243. That where leſſor of the plaintiff ſerved a regular notice on the defendant to quit at *Michaelmas*, and defendant not quitting accordingly, he brought his ejectment, and laid the demiſe to the plaintiff on the 30th of *September*. Leſſor afterwards, before the trial which was in *Hilary* term following, *accepted the rent due from* Michaelmas *to* Chriſtmas; this it was inſiſted being ſubſequent to the time when defendant had notice to quit, was a waiver of the notice, but the court were of opinion that it did not *of itſelf* amount to a waiver, but was proper evidence to be left to the jury, *quo animo* it was done. As it might be a waiver only of the double rent, to which leſſor was entitled; or he might have taken it under the terms, that it ſhould not be a waiver of the notice.

B

* But where the ejectment was by a landlord againſt his tenant *on a proviſo for a re-entry for a forfeiture*; it was held by the whole court, that the leſſor's bringing covenant for half a year's rent ſubſequent to the time of the demiſe laid in the declaration in ejectment, was a waiver of the right of entry for the forfeiture, and an acknowledgment that the covenant then ſubſiſted. For had the leaſe been at an end it could not ſupport an action of covenant. And courts at law always lean againſt forfeitures. *P. 177. Roe ex dim. Crompton v. Minſhall. Paſch. 33 G. 2. B. R. Bull. N. P. 96.

And on the ſame ground, where the ejectment has been on ſtat. 4 *Geo.* 2. *c.* 28. for non-payment of rent, acceptance of rent after the time of the demiſe laid, has been held to be a waiver of the right of recovery. For it is a penalty, and by accepting the rent the party waives the penalty. Per Aſton Juſt. Cowp. 247.

4. "Where leaſes for life or years are void or voidable, "poſſeſſion is recovered of the lands demiſed, by this action, "but it often occurs in evidence that the leſſor may have "*barred his right of entry and of recovery of the lands* by ſome "act."

I ſhall therefore conſider *the Caſes that have occurred on this Head.*

1ſt. "Where a leaſe is abſolutely *void*, nothing implied "ſhall amount to a confirmation of it, or a waiver of the "right of recovering the poſſeſſion from the tenant, who de- "rives his title under it." Co. Litt. 215. b.

* As where tenant for life made a greater leaſe than he could lawfully make, which of courſe was void, though he in remainder *accepted the rent*, after the death of the tenant for life, it was held not to confirm the leaſe, which was void *ab initio*. *P. 178. Doe ex dim. Simpſon v. Butcher. Dougl. 50.

So where *Jane* Lady *Bulkley*, being tenant for life, with remainders over in tail to her ſons and daughters ſucceſſively, with power to make leaſes for twenty-one years in remainder, but not in reverſion, intermarried with *Edward Williams*, who without her concurrence made a leaſe to defendant for ninety-nine years determinable on three lives. *Edward Williams* died, having received the rent during his life. After his death lady *Bulkley* received the rents, and granted receipts. She died, by which *Jane* her eldeſt daughter, became tenant in tail, and ſuffered a recovery, having received the rent till her marriage with the leſſor of the plaintiff, who alſo received the rents for ſome time after the marriage, and the counterpart of the leaſe was found in his poſſeſſion, and notwithſtanding thoſe ſeveral acceptances of rent, the leaſe was adjudged to be void; for being void at its creation, nothing ſubſequent could eſtabliſh it. Goodright ex dim. Wynne v. Humphrys. Dougl. 52, in notis. Jenkins ex dim. Yate v. Church. Cowp. 482. S. P.

"However where leſſee has entered under a leaſe for life "or years, which turns out afterwards to be void, it ſhould "ſeem that his entry having been lawful, he ſhall be deemed "a tenant at will, and ſhall be proceeded againſt accord- "ingly, particularly where there has been a receipt of rent."

I find

*P. 179. I find no * expreſs authority for this: But it has been laid down, that if *A.* be ſeiſed in fee, and a ſtranger enters by virtue of a leaſe for years which is void, and pays rent to *A.* *A.* can never proceed againſt him as a diſſeiſor, for the acceptance of rent is an allowance of the leaſe he claims, and conſequently the entry by virtue of it is made rightful.

Dyer 173 in marg.

1 Roll. Ab. 661.

Bull. N. P. 96.

2. "Where the leaſe is *voidable*, there ſome act is required "by the party who has a right, to ſhew that he has taken "advantage of his right. And as to what ſhall be deemed "ſuch act, and what a waiver of his right, it has been "decided."

Co. Litt. 211.

Pennant's Caſe. 3 Co. 64.

1. The leaſe in queſtion was with a condition that if the leſſee ſhould grant alien or aſſign the premiſes without the aſſent of leſſor, that then the leſſor might re-enter. Leſſee aſſigned part, and leſſor *accepted rent after the aſſignment* but it did not appear that he had notice of the aſſignment at the time. Upon this it was reſolved, 1ſt, That notice of the aſſignment was material and traverſable, for the aſſignment might be made ſo near the day of payment of the rent, and ſo ſecretly, that leſſor could not have knowledge of it, and ſo leſſee would have advantage of his own fraud. 2dly. *But where the leſſor has notice*, as if the right of re-entry be for non-payment of rent, which he muſt know there the acceptance of rent before an entry waives the right of entry. So if he diſtreins for it, it waives the right of entry for by diſtreining, he affirms the rent to have continuance.

*P. 180. * "And it is ſo in all caſes, where leſſor accepts rent after notice of a condition broken, which is to give him "right of entry."

Goodright ex dim. Walter v. Davids. Cowp. 803.

For where in a leaſe to defendant from the leſſor of the plaintiff, defendant covenanted "*not to aſſign or under-let* without licence from the leſſor, under hand and ſeal firſt had and obtained." Defendant did under-let ſeveral parts of the land, but it being proved that ſuch under-letting was well known to the leſſor of the plaintiff, and that he had accepted rent afterwards, it was adjudged to be clearly a waiver of his right of entry, and defendant had judgment.

Per Lord Mansfield. Cowp. 483.

So that where the leaſe is merely *voidable*, the acceptance of rent alone, *unaccompanied with other circumſtances*, is not confirmation. To make it ſo, it muſt be done *with a knowledge of the title at the time*; or where *the remainder man is by, and ſuffers the tenant to lay out his money in improvements in confidence of continuing tenant.*

2. "But a difference is to be obſerved on the operations "the ſame words when applied to leaſes for *life* or *for years*.

Pennant's Caſe. 3 Co. 64. a.

If a condition is annexed to a *leaſe for years*, and that in case of a breach that then the *leaſe ſhall be void*, in ſuch caſe, acceptance of rent after a breach of the condition ſhall make the leaſe good, for it is void. But in the caſe of a *leaſe for life*, with a like condition, and *to be void* on the breach of acceptance of rent after the condition broken, ſhall waive the forfeiture

forfeiture, * for an eſtate of freehold cannot be avoided without an entry. *P. 181.

3. "But how far this muſt be an actual entry on the lands, ſeems not to be ſettled."

In this caſe it is decided, that where an ejectment is brought by the leſſor againſt the leſſee on a condition of re-entry for non-payment of rent, proof of an actual entry and ouſter is not neceſſary. But *Salkeld* makes a quære, if an actual entry is not neceſſary where it is requiſite *to complete the title* of the leſſor of the plaintiff. For by the rule, the entry *of the nominal plaintiff only* is confeſſed; it confeſſes the leaſe but does not admit leſſor of the plaintiff's *right* to make it. Little v. Heaton. Salk. 259.

5th. In this action titles to lands ariſing under *Wills* are tried.

Theſe for the moſt part are caſes brought by the heir at law againſt the deviſee or againſt the perſon who claims to be heir at law, on the ground of baſtardy: Or by a deviſee claiming an eſtate under a will.

But it is previouſly to be obſerved that where a perſon brings an ejectment as heir at law, he muſt make out a regular pedigree from the anceſtor under whom he claims; mere report of relationſhip, or ſuppoſition are not ſufficient. For if ſuch evidence ſhould be admitted, the eſtate might be carried contrary to the rules of deſcent, as to the paternal inſtead of the maternal line for example. Roe ex dim. Thorne v. Loyd. 2 Black. Rep. 1099.

*In ejectments againſt deviſees, or their heirs, the matter turns on the due execution of the will, on the teſtator's capability to deviſe, or on the legality of the deviſe itſelf. *P. 182.

1. *As to the Execution of the Will.*

It is enacted by the ſtatute of frauds, 29th *Car.* 2. *c.* 3. "That all deviſes of lands or tenements, deviſeable either by common law or ſtatute, ſhall be in writing, and ſigned by the party deviſing the ſame, or by ſome other perſon in his preſence, and by his expreſs directions, and ſhall be atteſted by three or four credible witneſſes, and ſubſcribed by them in the preſence of the deviſor, otherwiſe ſuch will ſhall be void, and of none effect."

Under this ſtatute it is to be conſidered, 1ſt, To what eſtates it extends. 2. What ſhall be a ſufficient ſigning by the teſtator, and by the witneſſes. 3. Who are credible and ſufficient witneſſes within the ſtatute. 4. Of the effect and proof by them of the execution.

And 1ſt. *To what Eſtates it extends.*

1. The clauſe in the ſtatute only extends to ſuch eſtates as is by the ſtatute of wills, 34 & 35 *H.* 8. *c.* 5. That is only *eſtates of inheritance.* Therefore where the teſtator deviſed *copyhold eſtate* by will, but the will was not atteſted by any Tuffnell v. Page. 2 Atk. 37. Attorney Gen. v. Barnes.

*P. 183. 2 Vern. 598. S. P. Roe ex dim. Gillman v. Heyhoe. 2 Black. Rep. 1114. S. P. Whitchurch v. Whitchurch 1 Atra. 620. Wagſtaffe v. Wagſtaffe. 2 P. Wms. 258. 1 P. Wms. 741. Coppin v. Coppin. 2 P. Wms. 291. Stonehouſe v. Evelyn. 3 P. Wms. *P. 184. 252. Smith v. Codron. 2 Vez. 455. S. P. * Per Lord Mansfield. 3 Burr. 1775. Peate v. Ougly. Com. 197. Bond v. Seawell & ux. 3 Burr. 1773.

any witneſſes, it was held to be * ſufficient to paſs that eſtate, for that the ſtatute of frauds did not extend to it.

2. So this ſtatute does not extend to deviſes of *terms of years*; for they would go to executors, and the ſtatute never meant to take any thing out of their hands. And in this caſe where mortgagee under a long term of years purchaſed the inheritance, and deviſed it from his heir at law, but the will was not duly atteſted; his having a term in the ſame lands, which did not require ſuch atteſtation, was held not to take the will out of the ſtatute, but that it was void under it.

3. Where *a power is given to appoint the uſes and truſts of lands given to truſtees*, a will appointing thoſe uſes and truſts muſt be executed with the ſame ſolemnities of three witneſſes, *&c.* under the ſtatute of frauds, as if the lands themſelves were deviſed. For if allowed to be deviſed in a different manner from land, the ſtatute would be nugatory and though the power of appointing is *by other writing of the nature of a will*, it is the ſame.

4. So though the will is executed *in a foreign country*, yet if it is to operate to deviſe lands in *England*, it muſt be executed by three witneſſes.

2. *What ſhall be a ſufficient ſigning by the Teſtator, and who by the Witneſſes.*

1. It is not neceſſary that the witneſſes ſhould ſee the teſtator ſign. It is ſufficient if * the teſtator owns to the witneſſes that it is his name which is ſubſcribed to the will, and that they ſubſcribe their names in his preſence.

*2. "It is not neceſſary that the witneſſes ſhould atteſt in "the preſence of each other; or that the teſtator ſhould "declare the inſtrument executed to be his will; or that "the witneſſes ſhould atteſt every page, or ſheet, or folio "of it; or that they ſhould know the contents of it; or "that each ſheet, folio, or page, ſhould be particularly "ſhewn to them."

And therefore where Sir *Thomas Chitty* made his will conſiſting of *two ſheets of paper*, all in his own hand-writing and ſigned his name to each, and alſo made a codicil on a ſingle ſheet, which he ſigned. He called in a perſon, ſhewed him the will in the two ſheets and the codicil, and ſaid it was his will, and ſigned by him, and deſired him to atteſt them, which he did. Two other perſons were then called in; to them he ſhewed the *laſt ſheet* of his will and the codicil, which he ſealed before them, and they atteſted them, but theſe witneſſes *never ſaw the firſt ſheet of the will* it *was not produced to them, nor did any paper then lie on the table.* But after the teſtator's death both the ſheets were found in the teſtator's bureau, wrapped up together with the codicil. The court were of opinion, that if the firſt ſheet *was in the room* when the two laſt witneſſes ſigned, that the will was well executed, and that it was proper matter

be left to a jury, whether in fact it was ſo or not, though there ſeemed circumſtances ſufficient in * the caſe to ground a preſumption that the will was in the room at the time. *P. 185.

So where teſtator wrote a will, in which he deviſed a freehold eſtate, and ſigned it, but no witneſs *then* atteſted: Two years after he added a codicil *on the ſame ſheet of paper*, diſpoſing of ſome perſonal property; and this was ſubſcribed by three witneſſes. It was determined that this ſigning had reference to the firſt deviſe, and that the whole was to be conſidered as one will atteſted properly, though made at different times. Carleton ex dim. Griffin v. Griffin. 1 Burr. 549.

3. "It is not neceſſary that the three witneſſes ſhall be all preſent together at the time that the teſtator executes his "will."

For where it was found by a ſpecial verdict in ejectment, that the teſtator ſigned and executed his will in *December*, 1735, in the preſence of *two* witneſſes, who atteſted the ſame in his preſence, and that afterwards in the year 1739, that he went over his name with a pen in the preſence of another witneſs, who atteſted it at teſtator's requeſt. *Lee*, C. J. and the court were of opinion, that the will was well executed, and that it was not required by the ſtatute of frauds, that the *witneſſes ſhould all be preſent at the ſame time.* Jones v. Lake. 1742. In B. R. In not. 2 Atk. 176.

4. "But where the atteſtation is by witneſſes at different "times, the teſtator *muſt do ſome act of execution, or acknow-"ledge the ſignature of the name* in the preſence of each."

*For where the teſtatrix executed her will, in the preſence of two witneſſes, and afterwards in the preſence of a third, ſaid, this is my will, and deſired he would atteſt it; but did not ſay that the name ſubſcribed was her hand-writing, or put her ſeal on it, Lord *Hardwicke* was inclined to think that this was not a ſufficient execution of the will by the teſtatrix under the ſtatute. *P. 186. Gryle v. Gryle. 2 Atk. 176.

5. "So where the witneſſes atteſt the will ſeparately, it "muſt be the ſame will or inſtrument which they atteſt, for "their atteſtations to different papers ſhall not be put together, ſo as to make a good atteſtation."

For where teſtator made his will in writing, ſubſcribed by two witneſſes, and deviſed all his lands to *W. R.* and afterwards made a codicil, in which the will was recited, and this was alſo atteſted by two witneſſes, one of which had been a witneſs to the will, but the other was a new one: The queſtion was, if this was a ſufficient atteſtation by *three witneſſes* under the ſtatute. And the court held that it was not. Lea v. Libb. Carth. 35. Show. 69. 88. S. C.

So where teſtator had made his will, but not witneſſed, and afterwards made a codicil, which he expreſſed to be *a codicil to his laſt will*, this was executed by three witneſſes; it was held not to be a ſufficient atteſtation of the will, it not appearing to have been produced when the codicil was ſigned. Attor. Gen. v. Barnes. Gilb. Eq. Rep. 5.

6. It

Smith v. Evans. 1 Wilf. 313. *P. 187.

6. It was formerly an opinion that *ſealing* a will by a teſtator was a ſufficient ſigning within the ſtatute (*Warnford v. Warnford*, 2 *Stra.* * 764.) But that doctrine has ſince been over-ruled, and the courts have held that ſealing without ſigning is not a ſufficient execution of a will.

Lemayne v. Stanley. 3 Lev. 1. 3 Mod. 219. Salk. 608.

But where the teſtator's will was written in his own hand, and began "I *John Stanley, &c.*" But his name was not ſubſcribed to it, but the will was ſealed; it was adjudged to be a good ſigning within the ſtatute, which did not direct whether the ſigning was to be at the top or bottom of the will.

7. As to the atteſtation in the teſtator's preſence.

1. "The ſtatute required the will to be atteſted in the teſtator's preſence, to prevent the obtruding another will in "the place of the true one. It therefore is ſufficient if the "teſtator *might ſee* the witneſſes ſign it, it is not neceſſary "that he ſhould actually ſee them ſign it; for then if a "man ſhould turn his back or look off, it would vitiate the "will."

Shires v. Glaſcock. Salk. 688.

It therefore was in this caſe held to be a good execution and ſigning by the witneſſes within the ſtatute, where the teſtator deſired the witneſſes to go into another room, ſeveral yards diſtant, to atteſt the will, in which there was a window broken, through which the teſtator might ſee them. So where the witneſſes ſigned in the room with the teſtator, he being ſick in bed, and the curtains drawn, yet was the execution good.

*P. 188. Caſſon v. Dade. 1 Brown's Rep. 99.

*And in a more modern caſe this doctrine was recognized. Where the teſtratrix having given inſtructions to her attorney to prepare her will, came to his office to execute it, but being aſthmatic and unable to bear the heat of the office, ſhe went into her carriage, the witneſſes attending her to it, and ſaw her ſign it, and then they returned into the office to atteſt it; the queſtion was, whether this was a proper atteſtation in the teſtratrix's preſence. But it being proved that the carriage was put back to the office window, through which it was ſworn by a perſon in the carriage, that the teſtatrix might have ſeen the witneſſes ſign; the Chancellor was of opinion, that the will was well executed.

"Theſe caſes go on the preſumption that as the teſtator "*might have ſeen the atteſtation*, that the court will not pre"ſume, that he did not, but where that preſumption cannot "be admitted, there the atteſtation ſhall be deemed defec"tive, and the will not properly executed."

Eccleſton v. Petty. Comb. 156. Carth. 79. S.C. called Edleſtone v. Speake. 1 Show. 89. Broderick v. Broderick. 1 P. Wms. 239. S. P.

For where in ejectment by the heir at law againſt the deviſee, the plaintiff to deſtroy the will under which the defendant claimed, produced a ſubſequent will, atteſted by three witneſſes, who proved the ſigning by the teſtator in their preſence, but that they had ſigned not in the room with him, but in the hall, which was diſtant from the room where he was, and where he could not poſſibly ſee them

ſign

ign; this was held to be not a ſufficient * atteſtation within the ſtatute, and the will void. *P. 189.

2. And the bare ſubſcribing of a will by the witneſſes *in the ſame room with the teſtator*, does not neceſſarily imply it to be in the teſtator's *preſence*: for it might be done clandeſtinely and fraudently in a corner of the room, without his knowing what was doing. There ſhould be ſome circumſtances to ſhew that teſtator knew what was doing. As in this caſe *making* a *requeſt* to the witneſſes to ſign the will was held to be ſufficient. Longford v. Eyre. 2 P. Wms. 740. 2 Ref.

" For it is eſſentially neceſſary to the good atteſtation of a will, that it is executed with the *teſtator's knowledge*."

For where a will was drawn by the directions of the teſtator, and read over to him in the preſence of the three witneſſes, who afterwards ſubſcribed it: he ſigned the two firſt ſheets, and attempted to ſign the third, but being unable from weakneſs, he ſaid, " *I cannot do it, but it is my will.*" When the witneſſes returned again, *the teſtator was in a ſtate of inſenſibility*, nevertheleſs the witneſſes *then* ſubſcribed their names, and he died in two days after. This was held not to be a ſufficient atteſtation within the ſtatute. For it could not be ſaid to be executed in the preſence of the teſtator, who was at that time void of perception and underſtanding. Right ex. dim. Cater v. Price. Dougl. 229.

3. And it is not neceſſary that the atteſtation ſhould ſet out " that the ſigning was in * teſtator's preſence." For where all the witneſſes were dead, proof of their hands to one was held to be ſufficient. Croft. v. Pawlett. 2 Stra. 1109. *P. 190.

3d. *Who are ſufficient Witneſſes within the Statute.*

The witneſſes muſt be *credible ones*.

Witneſſes which are not credible ones within the ſtatute, are ſuch as are ſo, 1ſt, From being intereſted. 2dly, From crimes.

1. " Where a perſon is to derive any benefit under the will, whereby he becomes intereſted in eſtabliſhing it, he is an incompetent witneſs under the ſtatute." Holdfaſt ex. dim. Auſty v. Dowſing. 2 Stra. 1253.

As where teſtator having deviſed his eſtate to the defendant and his heirs in tail, charged it with an annuity of *l. per ann.* to the wife of one *John Hailes*: The will was atteſted by three witneſſes, one of which was this *John Hailes*. It was adjudged, on ejectment brought for the lands deviſed, by the heir at law, that the benefit which *Hailes*'s wife was to derive under the will, was to be conſidered as a benefit to himſelf, and to render him an incompetent witneſs under the ſtatute.

" For though one only of the witneſſes is intereſted, and the other two might prove the will, yet that will not be ſatisfying the ſtatute which requires that *each* ſhould be free from intereſt."

Which

Helier v. Jennyns. *P. 191. 1 L. Raym. 505.

Which was the caſe here, one of the witneſſes to the will being the deviſee of the lands * contained in the will, which was therefore held to be void.

" But as it often happened that a will being atteſted by " ſuch perſons as are uſually attending on a perſon when " on his death-bed, as his apothecary, ſervants, &c. and " who had demands againſt the eſtate, as for medicines, " wages, &c. and ſo being creditors to the eſtate, were in- " competent witneſſes under theſe deciſions, though the " will was otherwiſe fair and well executed," it was there- fore enacted, by ſtatute 25 *Geo.* 2. *c.* 6. " That any perſon " who ſhould atteſt the execution of any will or codicil, to " whom any beneficial deviſe, legacy, eſtate, intereſt, gift " or appointment ſhould be thereby given (other than and " except charges on lands, tenements and hereditaments " for payment of debts) ſuch deviſe, legacy, &c. ſhould as " to ſuch perſon be utterly null and void, and ſuch perſon " be a good witneſs to the will."

2. " But in caſe any lands, tenements, or hereditaments " ſhould be charged with the payment of debts, any creditor " whoſe debt was ſo charged, might nevertheleſs be a good " and competent witneſs to the execution of the will or co- " dicil by which the charge has been made."

Wyndham v. Chetwynd. 1 Burr. 414. *P. 192.

And accordingly the court of *King's-Bench* in this caſe where the witneſſes to the teſtator's will were two of the his attornies, and to whom he was indebted for buſine done, and the third his apothecary, to whom he was * al indebted, held them to be good and ſufficient witneſſes eſtabliſh the will. Though this caſe was decided on groun independent of the ſtatute, yet it ſeems to fall within it.

Oxendon v. Penrice. Salk. 691.

But though intereſt incapacitates a witneſs, yet may *legatee* be a witneſs *againſt* the will, for there he ſwea againſt his own intereſt.

2. A ſecond incapacity to a witneſs is *for crimes*, " " which caſe a witneſs ſo diſqualified ſhall not be a ſufficie " witneſs within the ſtatute."

Pendock ex dim. Mackender v. Mackender. 2 Wilſ. 38.

For where there were three witneſſes, who regularly h atteſted the will, but one of them was a perſon who h been *convicted of petty larceny*, and whipped, the court h him to be an *incompetent witneſs, as being infamous* both the crime and puniſhment, and the will was ſet aſide, the want of *three* credible witneſſes.

4. *Of the Proof of the Execution by the Witneſſes.*

1. " The *execution* of the will may be proved by one w " neſs."

Longford v. Eyre. 1 P. Wms. 740. 1 Reſ.

For one witneſs may not only prove the executing of will by the teſtator, and his own ſubſcribing it in the preſe of the teſtator; but likewiſe *that the other witneſs ſubſcri*

it, * in the preſence of the teſtator, which is a complete execution of the will. *P. 193.

And though in this caſe one of the witneſſes to the will would not ſwear that he ſaw the teſtator ſeal and publiſh the will, C. J. *Holt* was of opinion that the will might be well proved notwithſtanding, by proving ſuch witneſs's hand, and that he ſet it to the will as a witneſs, for otherwiſe it would be in the power of a third perſon to defeat the will which he had atteſted. Dayrell v. Glaſſcock. Skinner 413.

" So if the witneſs ſwears *againſt* his own atteſtation, as " that the teſtator *did not* regularly execute his will, yet this " ſhall not be ſufficient to invalidate it, for contrary teſti- " mony ſhall be admitted, on which the jury ſhall decide."

For where in an iſſue out of *Chancery*, *deviſavit vel non*, for lands in *Worceſterſhire*, the three ſubſcribing witneſſes to the teſtator's will, and the two ſurviving ones to a codicil made four years after the will, all ſwore that the teſtator at the time of making his will and codicil was utterly incapable of tranſacting any buſineſs, and a dozen ſervants of the teſtator ſwore to the ſame effect: To encounter this evidence, the counſel for the deviſee examined ſeveral of the nobility and principal gentry of *Worceſter*, who frequently and familiarly converſed with Mr. *Jolliffe*, the teſtator, during the whole period, and ſome on the day whereon the will was made, and alſo two eminent phyſicians, who occaſionally attended him, and * alſo the attorney who drew the will, all of whom ſtrongly depoſed to the entire ſanity, and more than common intellectual vigour of the deviſor. On this evidence, though in direct contradiction to the teſtimony of the ſubſcribing witneſſes, the jury found a verdict in favour of the will. Lowe v. Jolliffe. 1 Black. Rep. 365. *P. 194.

So where on a trial at bar on a deviſe, it was ſworn by two of the witneſſes, that the deviſor had not publiſhed the will, for that another perſon had guided his hand, and the teſtator made his mark, but ſaid nothing, nor was capable of ſaying any thing. In contradiction to this evidence it was proved, that the teſtator had made two former wills to the ſame effect as the preſent will, and that he died of a conſumption, and continued ſenſible and converſed to his death; on this evidence a verdict was found to eſtabliſh the will, it not being probable that a perſon who was ſenſible after the making of his will would ſuffer his hand to be guided to ſign that which he diſapproved, and yet ſay nothing. Hudſon's Caſe. Skin. 79.

But it ſeems now that a witneſs ſhould not be allowed to atteſt againſt his own ſigning, for where he was admitted and a verdict found againſt the will, ſeemingly on the ground of the evidence given againſt the will by the witneſs to it, the court granted a new trial. Goodtitle ex dim. Alexander v. Clayton. 4 Burr. 2224.

2. Having conſidered the *execution* of the will by the teſtator and witneſſes, it is neceſſary to take notice of certain

*P. 195. other eſſentials to a * valid will. That is, firſt, the capacity of the teſtator to make the will; and, ſecondly, the legality of the deviſe of itſelf; as a defect in either of theſe requiſites renders the will null and void.

1. *Of the Capacity of the Teſtator to make a Will.*

Before the ſtatute 32 *H.* 8. *c.* 1. lands in fee ſimple were not deviſeable by will, and by that ſtatute a power of deviſe was given to *all perſons* who were ſeiſed in fee, *&c.*

Dyer 564. b. But notwithſtanding thoſe general words the courts did not conſtrue it to give a power of deviſing to perſons who could not make a good and legal conveyance in any other ſhape, and therefore held, that *femes covert*, *perſons inſane*, *infants*, or *perſons under dureſs*, *or undue influence*, could not by will deviſe their lands.

As to infants, perſons inſane, and *femes covert*, their incapacity was afterwards declared by ſtat. 34 *H.* 8. *c.* 5. and as to perſons under undue influence, or deceived to make a will by practice or fraud, that remains on the common law footing.

1. As to wills made by *Infants*.

Herbert v. Torball. 1 Sid. 162. 1. If a perſon under the age of twenty-one years makes his will, and dies after he has attained that age, the will is void. 2dly, But if he *publiſhes* it after he has attained his

*P. 196. age of * twenty-one years, ſuch publication ſhall make the will valid and good.

Hawes v. Burton. Comb. 84. But where a man under age made his will, and after full age he *declared* in the preſence of ſeveral witneſſes *that the will ſhould ſtand good*; it was nevertheleſs held void, by reaſon that when firſt publiſhed teſtator was an infant, and this was no publication.

Anon. Salk. 44. 2. The day of the birth is excluſive, that is if a perſon is born the firſt of *February* at eleven at night, and the laſt day of *January* in the twenty-firſt year of his age, at one o'clock of the morning, makes his will and dies, that it is a good will to paſs his lands, for he was then of full age.

Perk. 221. 3. But *by cuſtom* an infant, under twenty-one years, may have a power of deviſing.

Godolph. Orph. Leg. p. 1. ch. 8. 2 Vern. 104. 469. But it is to be obſerved, that this incapacity to deviſe under the age of twenty-one years, extends only to caſes of *eſtates in fee ſimple*. For *terms for years*, *and chattel intereſts* may be deviſed by *males* at the age of *fourteen years*, and by *males* of the age of *twelve*.

2. As to wills made by *Perſons of non-ſane Memory*.

Theſe are either *Idiots* or *Lunatics*.

Idiots have no power of making a will, or diſpoſing of their property; for by ſtat. 17 *Ed.* 2. *c.* 9. " The king ſhall " have

" have the profits of * the lands of idiots, finding them ne- *P. 197.
" ceſſaries, and after their deaths ſhall render the eſtate to
" the heirs of ſuch idiots, in order to *prevent ſuch idiots from*
" *aliening their lands, and their heirs from being diſinherited.*"

Perſons deaf, dumb and blind come under this predica- Co. Litt. 42.
ment of idiocy, as wanting thoſe ſenſes by which the mind is furniſhed with ideas.

Lunatics are alſo incapable of making a will. For any un- Marquis of
ſoundneſs of mind diſqualifies the perſon from making a will. Wincheſ-
And it is not ſufficient that the teſtator be of ſuch under- ter's Caſe.
ſtanding or memory when he makes his will, as to be able 6 Co. 23.
to anſwer common or familiar queſtions, but he ſhould have a diſpoſing memory, that is, ſuch as would enable him to diſpoſe of his lands with underſtanding and reaſon.

3. As to wills by *Femes Covert*.

" A *feme*, during coverture cannot make a will, nor the 1 Burr. 431.
" ſpiritual court grant probate of any ſuch inſtrument:
" But in her marriage ſettlement ſhe may reſerve a power
" of making a will, which ſhall operate as an appoint-
" ment, and probate be granted of it."

And if the deviſe is of a chattel intereſt, under a power Stone v.
reſerved to the wife, the will cannot be given in evidence Forſyth.
till probate has been granted by the Eccleſiaſtical Court. Dougl. 681.

* 4. " *Fraud, circumvention*, or any improper practice, *P. 198.
" ſhall alſo avoid a will."

And it muſt be tried at law, for a court of equity will Webb v.
not interfere. Claverden.
2 Atk 424.

2. *Of the Legality of the Deviſe itſelf.*

1ſt. " If lands are held in *jointtenancy*, one jointtenant can- Litt. ſ. 287.
" not by will deviſe or diſpoſe of his moiety, but the ſurvi- Co. Litt.
" vor ſhall have the whole by ſurvivorſhip, for *by* the death 185.
" of one jointtenant, the title of the other accrues, but the
" title of the deviſee not till *after* the death of deviſor."

And where a jointtenant during the exiſtence of that eſtate Swift ex
made his will, and *afterwards ſevered the joint eſtate*, and dim. Neale
made partition; it was adjudged, that the will being v. Roberts.
void at its creation, did not derive any validity by the ſub- 3 Burr.
ſequent partition, but that the ſurviving jointtenant was en- 1488.
titled to the moiety which teſtator intended ſhould have paſſed by his will.

2. " All deviſes of lands in *mortmain* are declared to be
" void by ſeveral ſtatutes: As *Magna Charta*, ſt. 7 *Ed.* 1. ſt.
" *Weſt.* 2. *Ch.* 13. and others."

Under ſt. 43 *Eliz. c.* 4. deviſes of lands to different corporations have been held to be good by the courts, *as appointments to charitable uſes.*

*P. 199. * But a reſtriction is now put on thoſe by ſtat. 9 *G.* 2. *c.* 36. which enacts, "That no manors, lands, advowſons, *&c.* "or money in the funds, to be laid out in lands, or ſhall be "given to any bodies politic for charitable uſes, unleſs ſuch "gift be made by deed indented in the preſence of two cre- "dible witneſſes twelve months before the death of the do- "nor, and enrolled in chancery within ſix months after exe- "cution, or the ſtock be transferred within ſix months before "the death of the donor, and be to take effect from the "making, and be without power of revocation."

3. "But a will originally well made may be *revoked or* "*cancelled*, and that either impliedly or expreſsly."

1. *Of expreſs Revocations, or cancelling of Wills.*

1. It is enacted by ſtatute of frauds, 29 *Car.* 2. *c.* 3. "That "no deviſe of lands, tenements or hereditaments, which has "been made in writing ſhall be *revokable*, otherwiſe than by "ſome other *will or codicil in writing*, or other writing de- "claring the ſame, or by burning, cancelling, or tearing "the ſame by the teſtator, or by ſome perſon in his preſence, "and by his directions. And if the former will is altered, "or revoked by another, this laſt muſt be executed by the "teſtator in the preſence of three or four credible wit- "neſſes."

*P. 200. * Under this ſtatute it has been decided.

Cowp. 52. 1. "That the *mere act of cancelling* a will is no revocation, "it muſt be done *animo revocandi*, and any act done with "intention to cancel, ſhall operate to effect it."

Bibbex dim. Mole & ux. v. Thomas. 2 Black. Rep. 1043. Therefore where a teſtator took a will which he had made, part he tore and threw it on the fire *intending to deſtroy it*, but it fell off, and was ſaved without his knowledge; it was adjudged to be a ſufficient cancelling of the will.

2. "No will can operate to cancel a former good and va- "lid will, unleſs the latter will be executed with all good "and legal ſolemnities."

Onyons v. Tyrer. 1 P. Wms. 343. Therefore where a will was well made, and afterwards teſtator made another will, whereby he declared all former wills null and void, but this laſt was not duly executed, it was adjudged not to revoke the firſt will, which was good, for a good will cannot be revoked by a void one.

Maſon v. Limbrey. quot. 4 Burr. 2515. So where teſtator made his will of real and perſonal eſtates, and made two duplicates of it, one of which he kept in his own hands, and the other he delivered to *Limbrey*, the defendant. Before his death he altered in many reſpects the duplicate in his own poſſeſſion, and greatly obliterated it, and began to write over a new will, but never finiſhed it, nor did he ever apply to *Limbrey* to get back his duplicate.

*P. 201. It was adjudged, that the ſecond will being imperfect * was no revocation of the firſt, and teſtator did not mean to die inteſtate.

3. "Neither

3. " Neither ſhall a good will be revoked by any ſubſe-
" quent one, unleſs it appears in what manner and in what
" points the revocation was made."

For where on a ſpecial verdict the jury found, " That the teſtator had by will deviſed the premiſes in queſtion to the plaintiff, and that he afterwards made *another will, properly atteſted, different from the former, but in what points they do not know.*" It was adjudged that this ſhould not be deemed ſuch a revocation as ſhould take away the title of the plaintiff, which he had under the good will, but that it ſhould be deemed valid and ſubſiſting. Hardwood v. Goodright. Leſſee of Rolph. Cowp. 95.

4. " But though a will has been revoked by a ſubſequent
" one, *but not deſtroyed*, if the ſubſequent will is afterwards
" cancelled, the firſt will ſhall be thereby reſtored."

Teſtator having made a will in favour of the defendant, ſix years after made another will alſo in favour of the defendant. After teſtator's death both wills were found in his deſk, but *the ſecond will was cancelled*; it was reſolved that the firſt will was not revoked, for the ſecond will being cancelled, it was as if it never had exiſted, and teſtator's intention appeared by both wills to be that defendant ſhould take. And beſide, the ſtatute of frauds declaring, that where a former will is revoked by a ſubſequent one, that the ſubſequent one ſhould be a good * one, and properly atteſted, and the ſecond one here being a nullity, could not operate to revoke the firſt, which not being cancelled, muſt therefore ſtand. Goodright ex dim. Glazier v. Glazier. 4 Burr. 2512. *P. 202.

" But where the firſt will *is itſelf cancelled*, and alſo re-
" voked by a ſubſequent will, if this latter will is afterwards
" cancelled, yet it does not ſet up the firſt."

For where teſtator having made his will in two duplicates, delivered one to a friend to keep for him, and kept the other himſelf, he afterwards made another will, different from the former, and revoking all former wills, and at the ſame time tore off his name and ſeal from the former will, and cancelled it. Before his death he ſent for an attorney to make a third will for him, but was ſenſeleſs before he arrived. After his death the firſt and ſecond wills were found together, and *both were cancelled*, but the *duplicate of the firſt*, which he had taken from the perſon with whom he had left it, was found among his papers *uncancelled*. It was reſolved, 1ſt, that the cancelling of the copy in teſtator's own poſſeſſion cancelled the duplicate in the poſſeſſion of the perſon to whom he had entruſted it; and 2dly, that the firſt will being itſelf cancelled was ſet up again by the cancelling of the ſecond. Burtonſhaw v. Gilbert. Cowp. 49.

5. " And a will may be revoked by an act, which is in-
" complete and void in law, if the teſtator's intention ap-
" pears ſufficiently that it was ſo, to revoke the will, as by
" a feoffment *without livery, &c.*" 3 Atk. 73.

So

*P. 203. Beard v. Beard. 3 Atk. 72.

* So where teſtator made his will, duly executed, and deviſed away all his real and perſonal eſtate to his brother, and he afterwards made a deed poll, by which he gave all *to his wife*, though this deed was void, as a man cannot make a grant or conveyance to his wife in his life-time, yet the chancellor (Lord *Hardwicke*) held that it amounted to a revocation, but as it could not operate as a grant, that the perſon muſt be deemed to have died inteſtate.

2. *Of implied Revocations.*

Chriſtopher v. Chriſtopher. quot. Dougl. 35.

1. The firſt of this deſcription is *marriage* and the *birth of a child*, for theſe have been decided to amount to a revocation of a will made before the marriage had taken place.

† Per Lord Mansfield. Dougl. 38.

† But theſe events ſhall only be deemed a revocation where the *whole eſtate* has been diſpoſed of by the teſtator, and the children are left without a proviſion.

‡ Brady ex dim. Norris v. Cubitt. Dougl. 30.

‡ And where ſuch preſumption does ariſe, yet may parol evidence be admitted to rebut the preſumption, and ſhew that teſtator did not intend to revoke the former deviſe. A will which is revoked by ſuch implication may nevertheleſs be republiſhed by a ſubſequent inſtrument, properly atteſted referring to it.

Per Lord Hardwicke in Parſons v. Freeman. 1 Wilſ. 308, *P. 204.

2. If a teſtator has a legal eſtate, deviſes it by will, and afterwards *ſuffers a recovery* of it, this ſhall be deemed a revocation: And it is the ſame if he executes any conveyance of the * ſame effect, and takes back a new eſtate. But if he only leaſes for years, or lives, or mortgages to pay debts, theſe are only revocations *pro tanto*; and the caſe is the ſame of an equitable eſtate.

But if a man having the *equitable eſtate* deviſes it, and afterwards by legal conveyance takes the legal eſtate, it is no revocation: But where he obtains the legal eſtate, *under different terms and conditions*, it is a revocation. As where being ſeiſed in fee of the equitable eſtate, he by fine and recovery took the legal eſtate, *but ſubject to uſes to be declared by him and his wife.*

2 Atk. 425.

So if a perſon deviſes a leaſe for life of which he is ſeiſed, and he afterward purchaſes the reverſion, this is a revocation *pro tanto*, and it goes to the heir.

5. In this action the queſtion of *baſtardy* often comes in queſtion. The legitimacy of the reputed ſon and heir at law being queſtioned by the perſon, who, in caſe there had been no iſſue of the deceaſed, would have been his heir.

1ſt. "Though a man and woman have had a ceremony "performed for the purpoſe of marriage, yet if that has "not been regular, it is void, and the iſſue are baſtards."

To this effect, it is enacted by ſtatute 26 *G.* 2. *c.* 33. "That "if any perſon ſhall ſolemnize matrimony in any other "place

"place than a *church* * *or public chapel*, (except *by ſpecial li-* *P. 205.
"*cence* from the archbiſhop of *Canterbury*) or without *publi-*
"*cation of banns or licence* in a church or chapel, that the
"marriage ſhall be void. And further, that all marriages
"ſolemnized by licence, where either of the parties (not
"being a widow or widower) is under the age of twenty-
"one years, which ſhall be had *without the conſent of parents*
"*and guardians*, ſhall be abſolutely void."

1. This act of parliament requiring, that all marriages ſhall be performed in a church or chapel, and with licence or publication of banns *does not extend to marriages in Scotland or foreign parts*, nor to marriages among any *ſectaries*, as *Quakers*, *Jews*, &c. whoſe marriages are good, if according to their own rights, and both the parties are of the ſame perſuaſion. Buller N. P. 113.

2. "Neither does that clauſe concerning the marriages of "*perſons under age*."

For where in this caſe the appellant and reſpondent, both *Engliſh* ſubjects, and the appellant under age, ran away without the conſent of her guardian, and were *married in Scotland*; on a ſuit brought in the Spiritual Court to annul the marriage, it was held to be good. Compton v. Bearcroft. cor. Deleg. 1 Dec. 1768. Bull. N. P. 114.

But the ſtat. does not take away the evidence ariſing from cohabitation; though if the evidence be clear that the *marriage was not celebrated according to the requiſition of the act*, it is totally void, and no declaratory ſentence of the * eccleſiaſtical court is neceſſary to annul it. The caſe here was, that the man was under the age of twenty-one years, when he married. Rex v. Preſton next Feverſham. *P. 206. Mich. 33 G. 2. B. R. Bull. N. P. 114.

†Therefore in this caſe where the father and mother of a pauper had cohabited together for thirty years as man and wife, and after the death of the wife, the huſband was produced to prove that no marriage had ever actually taken place, which the ſeſſions refuſed. On motion to quaſh the order of ſeſſions, Lord *Manſfield* was of opinion, that thirty years cohabitation as man and wife was ſufficient evidence to found an order of removal on, and the order of ſeſſions was affirmed. Burr. Sett. Caſ. 486. S. C. † Stockland v. Charland. Burr. Sett. Caſ. 508.

And note, that where there has been a ſentence of the eccleſiaſtical court in a ſuit *cauſa jactitationis maritagii*, that there was no marriage, and that the parties are free of one another. That that ſentence while unrepealed is concluſive of the fact. Jones v. Bow. Carth. 225.

2. By the ſame ſtatute it is enacted, "That all marriages "ſhall be ſolemnized in the preſence of two or more credi-"ble witneſſes, beſides the miniſter, who ſhall celebrate the "ſame, and ſhall be entered in the regiſter, in which entry "ſhall be expreſſed whether the marriage was celebrated by "banns or licence, and ſigned by the miniſter and parties "married, and atteſted by two witneſſes."

"But

" But if the marriage has been regularly ſolemnized, any " ſubſequent irregularity in the entry ſhall not affect its " validity."

*P. 207. St. Devereux v. Much Dewchurch Burr. Sett. Caſ. 506. Bull. N. P. 114. S. C.

*For where a witneſs in this caſe proved, that he and another witneſs were preſent when a marriage was ſolemnized between *John* and *Suſannah Meredith*, by the miniſter of the pariſh by banns, and an entry was produced from the pariſh book, *viz.* " 1758, *John Meredith* and *Suſannah Jenkins* were married by banns." But this entry was not ſigned by the miniſter, parties or witneſſes. On which it was conteſted that the marriage was not legally proved. *Per curiam.* In a ſuit of jactitation of marriage in the Spiritual Court, while the parties are alive, they are put to prove all ceremonies: But in all other caſes proof by witneſſes who ſaw the marriage, is *prima facie* ſufficient, and whoever would impeach it muſt ſhew wherein it is irregular. Here the fact of the marriage is proved, and the *regiſter* is not of the eſſence of the marriage, nor affects its validity.

3. " Where no evidence can be had of the marriage " having been ſolemnized, collateral proof, as from decla- " rations or conſtant cohabitation, ſhall be ſufficient."

May v. May. Hil. 17 G. 2. Bull. N. P. 112.

Therefore where in this caſe the preamble of an act of parliament reciting that the plaintiff's father was not married, and to the truth of which he was proved to have ſworn, was given in evidence, yet it being proved on the other ſide that there had been a conſtant cohabitation between the parties, and that the deceaſed had on all other occaſions owned her as his wife, the plaintiff obtained a verdict.

*P. 208. *" But that preſumption ſhall only hold place where no " poſitive evidence can be had, for in caſe proof of the " marriage can be had, and that by the evidence, even of " the parties themſelves, ſuch ſhall be admiſſible and good."

St. Peter's Worceſter v. Old Swinford. Burr. Sett. Caſ. 25. Bull. N. P. 112. S. C.

For where on an appeal the caſe was ſtated, that *Joſeph Heighington, the father of the pauper*, gave in evidence, that for ſeven years, he travelled about with *Hannah Aſke*, during which time they cohabited as man and wife, but were never married, and that during that time the pauper was born and chriſtened as the legitimate child of him and *Hannah Aſke*. The evidence of the father was here held to be good and admiſſible to prove the fact of no marriage having ever taken place between the parties, though it went to baſtardize his iſſue.

4. " But though a marriage has in fact legally taken place " between the parties, yet may the iſſue born during its " ſubſiſtence be baſtards: As if the huſband is proved to " labour under an inability from any cauſe; or if there has " been no acceſs, *&c.* or the child be born out of time."

1ſt. *In Caſes of Inability in the Huſband.*

Ex dim. Lomax v. Holmden. 2 Stra. 940.

1. Where an ejectment on a trial at bar, the queſtion was, whether the leſſor of the plaintiff was the ſole heir of *Caleb Lomax*,

Lomax, deceaſed. It was proved fully, that he was frequently in *London*, where his wife lived, ſo * that acceſs must be preſumed. The defendants were admitted to give evidence of his inability, from a bad habit of body. But their evidence not going to an *impoſſibility*, but to an *improbability* only; that was not thought ſufficient, and plaintiff had a verdict. *P. 209.

So where a man had been divorced from his wife, *cauſa frigiditatis et impotentiæ*, and afterwards married again, and his ſecond wife had iſſue; it was contended that they were baſtards, by reaſon that the ſentence of divorce eſtabliſhed the queſtion of his inability, ſo that all iſſue born after of his wife ſhould be deemed baſtards. But the court held them legitimate, for the ſentence did not eſtabliſh a perpetual inability, and a man might be *habilis et inhabilis diverſis temporibus*. Bury's Caſe. 5 Co. 98 b.

2. *In caſes where there has been no Acceſs.*

"Where it appears clearly in evidence that there *has been* "*no acceſs*, the iſſue ſhall be baſtards." Rex v. Aberton. 1 Ld. Raym. 395.

As where a married woman was brought to bed of a child during her huſband's abſence at *Cadiz*, and it was proved that he had not been in *England* from the time of conception to her delivery, the child was held clearly to be a baſtard.

"And though acceſs may be preſumed, as from the parties "living not far diſtant, yet * may evidence ſtill be admit- "ted to prove that in fact no acceſs had taken place." *P. 210.

For where in an iſſue out of Chancery to try whether the plaintiff was the heir at law of *Thomas Pendrell*, it was agreed, that plaintiff's father and mother had been married, and had cohabited for ſome months; that they parted, ſhe laying in *London*, and he going into *Staffordſhire*: and that at the end of three years plaintiff was born. The plaintiff reſted his caſe on the preſumption of law in favour of legitimacy, and on there being ſome doubt if plaintiff's father had not been in *London* during the laſt year; but this was encountered by ſtrong evidence of want of acceſs. The Chief Juſtice *Raymond* over-ruled the old doctrine of legitimacy if the father is within the four ſeas, and left it to the jury to decide on the evidence, whether there was acceſs or not: and the jury found againſt the plaintiff. Pendrell v. Pendrell. 2 Stra. 925.

2. So where a woman is ſeparated from her huſband by a divorce *a menſa et thoro*, the children ſhe has during ſeparation are baſtards: For a due obedience to the ſentence ſhall be intended unleſs the contrary is ſhewn. But if a huſband and wife ſeparate and live apart, without ſentence of divorce, the children ſhall be taken to be legitimate, and ſo deemed till the contrary be proved. As in the laſt caſe of *Pendrell* v. *Pendrell*. So if a ſpecial verdict finds no acceſs, the child is a baſtard. St. George v. St. Margaret's, Weſtminſter. Salk. 123.

So where a caſe of removal ſtated, that there had been no acceſs for ſeven years, though * there was evidence that the *P. 211. Rex v. Inhabitants of

Bedall in Yorkſh. 2 Stra. 1076.

the huſband was living, it was held ſufficient evidence to baſtardize the iſſue, as if there was no acceſs it was immaterial whether the huſband was living or not.

3. "But where the iſſue of perſons married is to be baſtardized by evidence of *no acceſs*, the *wife ſhall not be admitted to prove that fact*, for that may be proved by the evidence of others; but ſhe is an admiſſible witneſs *to the fact of incontinence*, on account of the neceſſity of the thing."

Rex v. Reading. B. R. Mich. 8 Geo. 2. Bull. N. P. 112.

And therefore where the wife gave evidence of her having had connection with the defendant, and that he was father of the child, and that her huſband had had no acceſs to her for a great length of time, and there was no other evidence of the huſband's not having had acceſs to her, but there was evidence that he was within ſeven miles of her all the time; it was held that her evidence as to the fact of incontinence was good, as ſhe might be the only witneſs of it that could be had, but that of the non-acceſs that there might be others, and that ſo her evidence was inſufficient to that fact.

Rex v. Rook. 1 Wilſ. 340.

And in this caſe the ſame point was expreſsly decided.

3. *Where the Child has been born out of Time.*

1 Dan v. 726. *P. 212.

"It is not preciſely ſettled what ſhall be deemed the exact "and certain time for a * child to be born after the death "of the father, in order to be held to be legitimate."

Trin. 18 Ed. 1. Rot. 13. Bull. N. P. 114.

Where the feme went *eleven months* after the death of the huſband, it was reſolved that the iſſue was not legitimate, for it was born *poſt ultimum tempus mulieribus pariendo conſtitutum*.

Alſop v. Bowtrell. Cro. Jac. 541.

But in this caſe, where the huſband died the 23d of *March* and the child was born the 5th of *January* following, which was nine ſolar months and thirteen days; it being proved that the woman had been much abuſed, and often compelled to lie in the ſtreets; and phyſicians bearing evidence that ſuch treatment might delay the birth, the child was held to be legitimate.

Pride v. Earls of Bath and Montague. Salk. 120.

And note, That the rule *quod non juſtum eſt poſt mortem alterius quem baſtardum facere*, &c. holds only in the caſe of *baſtard eigne et muliere puiſne*. But if *H.* marries a woman, and ſhe marries again, living *H.* the laſt marriage is void, without any divorce, and the jury ſhall try the fact, which proves it not a marriage.

Goodright ex dim. Stevens v. Moſs. Cowp. 591.

And this rule that the parents ſhall not be allowed to baſtardize their iſſue, holds only where it is to baſtardize iſſue *born after marriage*; for either parent may be an evidence in their life-time, that a child was born before marriage: and general declarations to that effect, or an anſwer in chancery are good evidence to prove a child born before marriage, but not to baſtardize a child born after marriage.

6.

*5. If leſſor of the plaintiff's title is under an aſſignment by an adminiſtrator, if he cannot produce the letters of adminiſtration, the book of the eccleſiaſtical court, where the order was entered for the granting of them, is good evidence, or a copy of the book will be ſufficient; but ſuch will not be ſufficient for the adminiſtrator himſelf, unleſs he proves that the adminiſtration under the ſeal of the court was loſt. *P. 213. Garrett v. Lyſter. 1 Lev. 25.

So if an ejectment is brought againſt the deviſee of a copyholder, *by the lord or by a ſtranger*, the recital of the will in the admittance is good evidence of the deviſe. But if the ejectment is *by the heir* againſt the deviſee, the will itſelf muſt be proved. Anon. 1 Lord Raym. 735.

7. An *old terrier or ſurvey of a manor*, whether eccleſiaſtical or temporal may be given in evidence, for there can be no other way of aſcertaining old boundaries or tenures. Bull. N. P.

But a *terrier of glebe* is not evidence for the parſon, unleſs ſigned by the churchwardens, as well as the parſon, nor even then if they are of his nomination; and though it be ſigned by them it deſerves little credit, unleſs it be likewiſe ſigned by the ſubſtantial inhabitants: But it is in all other caſes evidence againſt the parſon. Ibid.

So where the queſtion in ejectment was, "*parcel or not*," a *ſurvey* taken by one of the parties, without the privity or concurrence of the other, was held to be no evidence. Anon. 1 Stra. 95.

*8. The *tenant in poſſeſſion* is not an admiſſible witneſs for the leſſor of the plaintiff; for he is liable to an action for the meſne profits, and ſo being intereſted is inadmiſſible. *P. 214. Bourne v. Turner. 1 Stra. 633.

9. If an *executor takes no beneficial intereſt* under a will, he is a competent witneſs to prove the ſanity of the teſtator; and if *he or any other perſon who is intereſted, executes a ſurrender, or a releaſe of his intereſt*, he may be examined as a witneſs to eſtabliſh the will, though the perſon to whom the ſurrender or releaſe was offered to be made, refuſed to accept of it. Goodtitle, Leſſee of Fowler v. Welford. Dougl. 134.

10. *An heir apparent* may be a witneſs to prove the title of land, but a *remainder-man* cannot, for he has a preſent eſtate in the land: But the heirſhip of the heir is a mere contingency. Here the caſe was, the heir of a bankrupt was brought to prove a debt due to him in an action by the aſſignee, and an objection was taken to his evidence, that the ſurplus of the real eſtate (which is only to come in aid of the perſonal) being to go to the bankrupt and his heir, that the heir by ſwearing as to the perſonal eſtate, has the benefit that he diſcharges the real eſtate as to ſo much, but the Chief Juſtice over-ruled the objection, as too remote a contingency. Smith v. Blackham. Salk. 283.

*P. 215. *5th. OF THE VERDICT, JUDGMENT, WRIT OF POSSESSION, AND OTHER PROCEEDINGS.

1st. *Of the Verdict.*

1. "In ejectment the plaintiff shall always recover according to the title which he makes out, though not consistent with that stated in the declaration."

As in the case of *Bedford ex dim. Carruthers* v. *Dendien* ante 158. where plaintiff having a title to but five years, yet declared for seven, but recovered notwithstanding according to his title.

Ante fol. 157. So plaintiff may declare for any number of acres, and recover so many only as he proves a title to.

2. "If the declaration in ejectment goes for several things, and there is a general verdict, though the declaration is bad as to part, yet plaintiff may recover for the remainder."

Wood v. Payne. Cro. Eliz. 186. As where the declaration was for a messuage *or* tenement and four acres of land belonging to the same, and there was a general verdict; on a motion in arrest of judgment it was decided, that though the declaration as to the first part for a messuage *or* tenement was bad for uncertainty, yet it was held to be good as to the four acres, which could not be said to belong to any house. But the damages and costs *P. 216. being *intire, it was held that plaintiff could not have judgment as to them.

Anon. Dyer 47 a. 3. In a recovery in ejectment of one hundred acres of land, twenty of pasture, *&c.* without mention of any *house* or *garden*, it was nevertheless held that plaintiff should recover all the erections thereon.

2. *Of the Judgment.*

Hooper v. Dale. 1 Stra. 531. 1. The casual ejector can in no case confess a judgment.

†2. Though plaintiff has had a judgment regularly obtained, if he has not lost a trial, yet the court will set it aside upon payment of costs and taking notice of trial.

†Dobbs v. Passer. 2 Stra. 975. For though the *defendant* may afterwards bring *his* ejectment, yet change of possession, in consequence of the plaintiff's judgment, may be of great loss and inconvenience to the defendant, as felling timber, *&c.*

3. By stat. 16 *Car.* 2. *c.* 8. *s.* 17. "If defendant in ejectment brings a writ of error, he shall be bound to the plaintiff in such reasonable sum as the court shall think fit."

This sum is generally double the rent.

4 Burr. 2502. "Under this statute the defendant is entitled by law to his writ of error, if he offers to become bound as the statute directs."

There

• Therefore where in this caſe the leſſor of the plaintiff ſwore that the defendant was inſolvent, and alſo that *he* had a mortgage againſt the land to more than it was worth, yet the court held the defendant entitled to his writ of error, he becoming bound in double the rent. *P. 217. Evan Thomas v. Goodtitle. 4 Burr. 2501.

And by the ſame ſtatute, "In caſe judgment be affirmed "upon a writ of error, the court may award a writ of en- "quiry as well of the meſne profits, as of the damages by "any waſte committed after the firſt judgment."

Though in this caſe where defendant brought a writ of error in parliament upon a judgment in ejectment, the court obliged him *to enter into a rule not to commit waſte or deſtruction during the pendency of the writ*; and he juſtified in 400*l.* Wharrod v. Smart. 3 Burr. 1823.

4. A writ of error cannot be ſued out in the name of the caſual ejector. 2 Burr. 757.

And if judgment has been ſigned againſt the caſual ejector by default, when plaintiff moves for leave to take out execution againſt the caſual ejector is the time when the landlord, if he brings a writ of error, is to ſhew that as a cauſe why the plaintiff ſhould not have leave to take out execution, and if he then omits it, and leave is given, the execution will not be ſet aſide. George ex dim. Bradley v. Wiſdom. 2 Burr. 756.

5. "Nothing ſhall be aſſigned for error, which will make "it neceſſary to go again into the title of the lands."

• For where after a judgment for the plaintiff, error was aſſigned, that the leſſor of the plaintiff was ſeized in right of his wife, and that ſhe was dead before judgment, and that ſo the leaſe was determined; it was adjudged, that as the error depended upon the death of one not party to the ſuit, that it could not be allowed, for the plaintiff might ſay, that leſſor was ſeiſed in his own right or the like, and ſo the title would be to be re-examined on a writ of error. *P. 218. Wilkes v. Jordan. Hob. 5.

3. *Of the Writ of Poſſeſſion.*

Firſt. If the leſſor of the plaintiff has judgment in ejectment, it is to recover the term upon which an *habere facias poſſeſſionem* iſſues to the ſheriff, to put the plaintiff into poſſeſſion.

2. But if a year and day paſs after judgment the plaintiff cannot have an *habere facias poſſ.* without a *ſcire facias* firſt ſuing. Withers v. Harris. Salk. 258.

3. Where the leſſor of the plaintiff died in the vacation, and the writ of poſſeſſion was taken out after his death, but teſted of the laſt day of the preceding term, and ſo pre-reached the time of his death, the writ was held to be regular. Doe ex dim. Beyer v. Roe. 4 Burr. 1970.

4. *Of the Coſts.*

If the leſſor of the plaintiff is an *infant*, the court on motion ſtay proceedings, till he gets ſomebody to enter Anon. 1 Wilſ. 130. Noke v. Wyndham. 1 Stra. 694.

*P. 219. enter into a rule to pay * defendant his coſts if defendant has a verdict, an infant not being liable to coſts.

Dem ex dim. Lucas v. Fulford. 2 Burr. 1177.

2. Where the leſſor of the plaintiff *lived in Ireland*, the court ſtayed proceedings till he had given ſecurity for payment of coſts, though the ejectment was brought under the direction of the court of chancery, and ſecurity had been already given there for 40*l.*

3. "Though the leſſor of the plaintiff's title is at an end, "yet the court will not ſtay proceedings."

Thruſtout ex dim. Turner v. Gray. 2 Stra. 1056.

As where his title was as *tenant for life*, and it appearing *that he was dead*, defendants applied to ſtay the proceedings. But the court refuſed the motion, as plaintiff had a right to proceed for damages and coſts; but they obliged him to find ſecurity for coſts.

Jordan v. Harper. 1 Stra. 516.

4. If there is an ejectment againſt ſeveral, and the plaintiff is nonſuited, he may pay the coſts of the nonſuit to which of the defendants he pleaſes.

5. By ſtat. 8 & 9 *W.* 3. *c.* 11. "In ejectment againſt ſeve- "ral, if any one or more is acquitted by verdict, he ſhall "recover his coſts againſt the plaintiff, unleſs the judge ſhall "certify in open court that there was good cauſe for making "ſuch perſon a defendant."

*P. 220.

*5. *Of bringing a ſecond Ejectment.*

Anon. Salk. 255. Grumble v. Bodily. 1 Stra. 554.

1. Plaintiff may bring a ſecond ejectment for the ſame lands, but unleſs it appears to the court that there is good ground for bringing ſuch ſecond ejectment, the court will ſtay proceedings *until the coſts of the firſt are paid.*

Doe ex dim. Chambers v. Law. 2 Black. Rep. 1180.

As where it is done merely for vexation, or there is any thing fraudulent in the proceedings.

† Smith ex dim. Ginger v. Barnardiſton. 2 Black. Rep. 1704.

† And though the leſſor of the plaintiff had neglected in the former ejectments to enter into the conſent rule, yet proceedings were ſtayed until payment of coſts.

"But where the plaintiff does ſhew ſome good and ſatisfactory grounds to the court, he may be allowed to bring "the ſecond ejectment, without paying the coſts of the "firſt."

‡ Short v. King. 1 Stra. 681.

‡As where the plaintiff declared on one demiſe, but afterwards finding it neceſſary to join truſtees, he delivered a new ejectment, the court allowed it without payment of coſts.

"But a *miſtake* alone ſeems not to be ſufficient to exempt "the plaintiff from payment of coſts."

Lord Coningſby's Caſe. 1 Stra. 548.

For where Lord *Coningſby* brought an ejectment, and had a rule for a trial at bar, and finding it to be on a wrong demiſe, delivered * new ejectments, and coming again for trial at bar, the court refuſed to grant it, but on payment

*P. 221. of the coſts of the former ejectment.

"And though there may be ſome difference as to the par- "ties in the two ejectments, yet *if the queſtion and title is*

"*ſa*

"*ſame*, the coſts of the former ejectment ſhall be paid before "the ſecond is ſuffered to proceed."

As where an ejectment had been brought under the demiſe of the huſband and wife, and the plaintiff had been non-ſuited. And after the huſband's death, the wife brought a new ejectment; the court ſtayed proceedings in it till the coſts of the firſt ejectment were paid. Doe ex dim. Ducheſs of Hamilton v. Hatherly. 2 Stra. 1152.

2. After a verdict in ejectment and judgment for the plaintiff, if defendant brings a writ of error, he ſhall not be allowed to bring an ejectment until he has quitted poſſeſſion, or the tenants have attorned to the plaintiff, ſo that plaintiff is in poſſeſſion, and he out. For if the plaintiff in the firſt ejectment was to get judgment in this there would be two judgments for the ſame thing. But if defendant goes on a different title, proceedings will not be ſtayed in the ſecond ejectment. Fenwick v. Groſvenor, Salk. 258.

6. *Of Treſpaſs for the meſne Profits.*

1. "The verdict in ejectment having eſtabliſhed the right "of the plaintiff, from the time that his title accrued, the "defendant is a treſpaſſer, and the plaintiff entitled to "*recover from him damages for his unjuſt poſſeſſion, equal "to the value of the lands during that time, this is done "by an action of *treſpaſs*, the damages in ejectment being "uſually but one ſhilling." *P. 222. 3 Black. Com. 205.

But it ſeems to be a point not clearly ſettled how much the plaintiff is entitled to recover for the meſne profits.

In this caſe it is held that plaintiff is not bound to claim the meſne profits *only from the time of the demiſe*; for if he proves his title to have accrued before that time, and proves the defendant to have been longer in poſſeſſion, he ſhall recover antecedent profits. De Coſta v. Atkyns. Per Eyre Ch. J. Hil. 4 G. 2. Bull. N. P. 87.

But in ſuch caſe if plaintiff goes for time *before the demiſe*, the defendant is at liberty to *controvert his title*, but if he goes only for the time of the demiſe laid, the record againſt him of the recovery in ejectment is concluſive evidence of the plaintiff's title from that time, and cannot be controverted; and in ſuch caſe it is ſufficient for the plaintiff to produce the judgment in ejectment and the writ of poſſeſſion executed. So againſt a precedent occupier the record is no evidence, and therefore againſt him the plaintiff muſt ſhew and prove a title. Ibid. and 2 Burr. 667. Collingwood & Ramſey, v. ſeveral Defendants. 1 Sid. 239.

"So with regard to poſſeſſion another doubt ariſes."

In this caſe it is held, that the plaintiff will be entitled to recover the meſne profits only from the time he can prove himſelf to have been in *actual poſſeſſion, and therefore if a man makes his will and dies, the deviſee will not be entitled to the profits till he has made an actual entry. Stanynought v. Coſins. 2 Barnes 367.

On *P. 223.

2 Roll. Abr. Title Treſpaſs per Relation.

On the other hand it is laid down that when the plaintiff has once made an actual entry, that that will have relation to the time of his title accrued, ſo that he may recover the meſne profits from that time.

Bull. N. P. 88.

But however if a ſubſequent entry has a relation back to the time of plaintiff's title accrued, yet the defendant may plead the ſtatute of limitations, and ſo protect himſelf from all but the laſt ſix years.

Aſlyn v. Parkyn. 2 Burr. 665.

2. This action of treſpaſs for the meſne profits may be brought either by the *nominal plaintiff in ejectment, or by the leſſor of the plaintiff himſelf*, even in the caſe of a judgment by default againſt the caſual ejector. But if the action is brought by the nominal plaintiff in ejectment, the court will, upon application, ſtay proceedings *till ſecurity is given for anſwering the coſts.*

Bull. N. P. 89.

Goodtitle v. Toombs. 3 Wilſ. 118.

3. If one *tenant in common* recovers in ejectment againſt the other, he may maintain an action of treſpaſs for the meſne profits; though the contrary doctrine is expreſsly laid down in *Litt. ſ.* 323. *Co. Litt.* 199.

Thorp v. Fry. Oct. Str. 5. Bull. N. P. 87.

4. Where the judgment is againſt the *tenant in poſſeſſion*, and the action of treſpaſs is brought againſt *him*, it ſeems ſufficient to produce the * judgment, *without proving the writ of execution executed*, becauſe by entering into the rule to confeſs, the defendant is eſtopped, both as to leſſor and leſſee. So that either may maintain treſpaſs without proving an actual entry: But where the judgment was againſt the *caſual ejector*, and ſo no rule entered into, the leſſor ſhall not maintain treſpaſs without an actual entry, and therefore ought to prove the writ of poſſeſſion executed.

*P. 224.

Holdfaſt v. Morris. 2 Wilſ. 115.

5. In treſpaſs for the meſne profits againſt the tenant in poſſeſſion after a recovery in ejectment by default againſt the caſual ejector, the tenant cannot *pay the money into court*, ſo the action is for a tortious occupation from the time the tenant had notice of the title of the leſſor of the plaintiff.

Bull. N. P. 88.

6. Where this action is brought after a judgment by default againſt the caſual ejector, it is uſual for the plaintiff to recover the coſts of the ejectment as well as the meſne profits.

*INTRODUCTION. *P. 225.

HAVING now treated of actions of treſpaſs *vi et armis*, actions of treſpaſs *on the caſe* only remain to be conſidered: Theſe conſtitute the ſeveral actions of

1. *Slander* and *malicious proſecution*, or treſpaſs on the caſe with reference to the *perſon*.
2. *Trover*, or treſpaſs on the caſe, with reference to *perſonal property* only.
3. *Treſpaſs on the caſe*, properly ſo called, with reference to real property.

* CHAPTER X. *P. 226.

THE ACTION OF SLANDER.

SLANDER is the defaming a man in his reputation, by ſpeaking or writing words from whence any injury in character or property ariſes or may ariſe, to him, of whom the words are uſed.

Slander may be committed, 1ſt, By *Words*. 2dly, By *writing*, which is called, by *libel in ſcriptis*. 3d. By *pictures* or repreſentations of that ſort, which is called *libel ſine ſcriptis*. Caſe de Libellis Famoſis. 5 Co.

In treating of this action I ſhall firſt conſider each ſpecies of ſlander now laid down in its order, and the rules of conſtruction adopted by the courts. 2d. The pleadings. 3d. The verdict, judgment and coſts.

1. OF SLANDER BY WORDS.

Words for which this action may be maintained are, either ſuch as are in themſelves * actionable, or ſuch as become *P. 227.

become ſo by reaſon of ſome ſpecial damage ariſing from them.

1ſt. *Of Words in themſelves actionable.*

Theſe are 1ſt, Which bring a man into any danger of legal puniſhment: As to ſay, "That he poiſoned another." 2dly, Which may operate to exclude a man from ſociety: as to ſay, "That he hath an infectious diſeaſe." 3dly. Which injure a man in his trade or profeſſion, as to call a *trader* a *bankrupt*. 4thly, Which charge a man in a public capacity or office with principles inconſiſtent with his office: As to ſay of a *juſtice of peace* "that he was a Jacobite, and for bringing in the Pretender."

1. *Of Words actionable from their bringing the Perſon of whom they are ſpoken, to the Danger of legal Puniſhment.*

1ſt. "Theſe words muſt charge *a fact to have been committed.* "For to charge a man with *bad or evil intentions*, is not ſuf- "ficient."

Eaton v. Allen. 4 Co. 16. b.

As where defendant ſaid of the plaintiff, "He is a brawler and quarreller, and gave his champion counſel to kill me, and then fly the country." Theſe words were adjudged not to be actionable, for they charge no fact committed, and the purpoſes or intentions of a man without action are not puniſhable by law.

*P. 228. Bland's Caſe. Hutt. 18.

* So where the words were "He is a troubleſome fellow, and I doubt not to ſee him indicted at the next aſſizes for ſheepſtealing." Theſe words were adjudged not to be actionable as not charging the party with any fact committed.

"For the words ſhould import ſome degree of *guilt*."

Steward v. Biſhop. Hutt. 2.

So that to ſay a man is *in gaol* for ſtealing a horſe is not actionable; for the perſon might be innocent, and the words only import his being in on ſuſpicion.

Beavor v. Hides. 2 Wilſ. 300.

But in this caſe when the words were of the ſame import "He was put into the round-houſe for ſtealing ducks at *Crowland*." The plaintiff had a verdict, and on a motion in arreſt of judgment, the court held that he ſhould recover, the jury having found them to be *falſe* and *malicious*.

"On this ground *adjective words* are actionable or not, according as they *preſume an act committed or not*."

Brittridge's Caſe. 4 Co. 18. b.

As where the words laid were, "He is a *perjured old* knave." That diſtinction was taken, ſo that if one calls another *ſeditious* or *thieviſh* knave, theſe words are not actionable, for they only import an inclination to ſedition or theft, not that the party ever was guilty of either, but the word *perjured* imports an act committed, and ſo is actionable.

2. "If

*2. "It is not neceſſary to make words actionable under *P. 229.
"this head, that they *endanger the perſon's life*, or charge Finch's
"him with felony, for to charge him with any leſſer crime, Law. 186.
"for which he is *liable to proſecution*, is actionable. As to
"ſay he hath gone about to get poiſon to kill the child, that
"ſuch a woman goeth with (which is no felony) yet theſe
"words are actionable."

So where the words were "You are a thief—Of what? Morgan v.
of every thing." Theſe were held to be actionable. Though Williams.
the theft might be of what was no felony, as apples from a 1 Stra. 142.
tree, for that the court would intend it to be of every thing
of which he could be a thief.

And note, that where a perſon had been a thief, but a ge- Cudding-
neral pardon of all felonies had paſſed, of which he had ton v.
taken the benefit, and a perſon afterwards called him, Wilkins.
"Thief." The words were held to be actionable, he being Hob. 81.
cleared of all guilt by the pardon.

3. "Though the words may import a charge of felony,
"yet if it appears that the fact charged could not have hap-
"pened, this action will not lie."

As where the plaintiff declared, that defendant having a Snag v.
wife then living, ſaid of the plaintiff, "He has killed my Gee.
wife, he is a traitor." On demurrer the words were ad- 4 Co. 16. a.
judged not to be actionable, for that the wife being living,
plaintiff could never be brought into danger, and ſo the
words were vain, and no ſcandal.

*2. The ſecond claſs of actionable words are *P. 230.

Words which operate to exclude a Man from Society.

As to ſay of a man that "He is a leper, or hath got the Tarlor v.
leproſy," is actionable, for "a leper" ſhall be removed from Packins.
the ſociety of men by a writ *de leproſo amovendo*. 1 *Roll. Ab.* Hil. 4 Jac.
344. B. R.

So where the words were "He is full of the pox, I mar- Cruttal v.
vel that you will eat with him." Theſe words were adjudg- Horner.
ed to be actionable. Hob. 219.

James v.
†But the words muſt charge the perſon with having ſuch Rutlech.
diſorder *at the time of ſpeaking the words*, for if not, the 4 Co. 17. a.
words do not operate to exclude the perſon from ſociety. † Carſlake
As "ſhe *hath* given the bad diſorder to ſeveral," is not ac- v.
tionable as not ſpoken in the preſent tenſe. Mapledo-
ram.

3d. The third claſs of words in themſelves actionable are Paſch. 28 G.
Words which injure a Man in his Trade or Profeſſion. 3. 2 Term
‡1. As where the words were ſpoken of an attorney, Rep. 473.
"What does he pretend to be a lawyer? He is no more a ‡ Day v.
lawyer than a devil." Theſe words as ſcandalizing him in Buller.
his profeſſion were adjudged to be actionable. 3 Wilſ. 59.

So if one ſays of a merchant, "He is a bankruptly 4 Co. 19. a.
knave," or "That he will be a bankrupt within two days,"
or ſuch like inſinuations; theſe words are actionable.

"And words tantamount, as conveying implied ſlander,
ſhall be deemed actionable."

*P. 231. Stanton v. Smith. 2 Stra. 762.

* As where the words were, "You are a ſorry fellow "and a rogue, and compounded your debts for five ſhillings "in the pound." Theſe were held to be actionable when ſpoken of a trader, being tantamount to calling him *bankrupt*.

2. "When words are uſed to any perſon which are ap- "plicable to his profeſſion or calling, and tend to ſcandalize "it, they ſhall be taken as applying to it, and be action- "able."

Byrchley's Caſe. 4 Co. 16.

As where *Byrchley*, the plaintiff, being one of the attornies or clerks in court of *B. R.* and ſworn to deal duly without corruption in his office, defendant ſpeaking of plaintiff's manner of dealing in his profeſſion, ſaid to *Byrchley*, "You "are well known to be a corrupt man, and to deal cor- "ruptly." Theſe words were adjudged to be actionable, as ſlandering him in his profeſſion, to which the words referred, for *ſermo relatus ad perſonam, intelligi debet de conditione perſonæ*.

4. The laſt ſpecies of words in themſelves actionable are

Words ſpoken in Derogation of a Perſon in any Office of Dignity, Truſt, or Profit;

As public officers, magiſtrates, &c. Under which head may be conſidered *ſcandalum magnatum*, or ſlander of peers, or other eminent perſons.

1. "With regard to this head it is to be obſerved, that "words may be actionable with regard to theſe, which would "not be held ſo in the caſe of a common perſon."

*P. 232. Proby v. Marquis of Dorcheſter. 1 Sid. 233.

* As where the words were uſed of the marquis of *Dorcheſter*, "My lord is no more to be valued than the dog that "lies there." Theſe words were held to be actionable.

"So in the caſe of a common perſon words importing "merely *bad inclinations* are not actionable (ante 227), but it "is otherwiſe in the caſe of *public perſons or magiſtrates*."

How v. Prinn. Salk. 694.

For where plaintiff declared, that being a *juſtice of peace* and *deputy lieutenant*, and having ſerved as knight of the ſhire for the county of *Glouceſter*, and intending to ſtand candidate for it again, the defendant ſaid of him, "He is a Jacobite, and for bringing in the Pretender and popery to deſtroy our nation." Theſe words, which only charged inclinations and principles, were held to be actionable.

Aſton v. Blagrave. 1 Stra. 617. 2 Ld. Raym. 1369. S. C.

So where the words were ſpoke of the plaintiff, who was a *juſtice of peace*, "He is a raſcal, a villain, and a liar;" they were held to be actionable, when applied to a perſon in an office of truſt or dignity.

Stuckley v. Bulhead. 4 Co. 16. a.

So where the words were ſpoken of *Stuckley*, who was a juſtice of peace for *Devonſhire*, "*Stuckley* covereth and hideth felonies, and is not worthy to be a juſtice of peace." The plaintiff recovered, for it was againſt his oath and office, and a good cauſe to put him out of the commiſſion, and indict and fine him.

2. "But

2. "But where the words do not charge the perſon in "ſuch truſt or office, with any * breach of his duty or oath, "with any crime or miſdemeanor, whereby he has ſuffered "any temporal loſs in fortune, office, or any way whatſo- "ever, but are ſpoken *as matter of opinion* as to ſuch perſons "conduct, ſuch words are not actionable." * P. 233.

As where plaintiff being knight of the ſhire for the county of *Surry*, defendant, at a meeting of the freeholders of the county, uſed the following words: "As to inſtructing Mr. *Onſlow*, you might as well inſtruct the winds, and ſhould he promiſe his aſſiſtance, I ſhould not expect that he would give it." Theſe words were adjudged not to be actionable, as charging no crime, but being merely matter of opinion; and per lord chief juſtice *De Grey*, to impute to any man the mere defect of moral virtue, moral duty, or obligation, which renders a man obnoxious is not actionable. Such as the preſent caſe, which is merely inſinuating a doubt of Mr. *Onſlow*'s honour. Onſlow v. Horne. 3 Wilſ. 177.

3. But a diſtinction is to be obſerved, when the words are uſed to a perſon in an office of *profit*, and when in one of *credit* only. *In offices of profit*, words that impute either want of *underſtanding*, of *ability*, or *integrity*, are actionable, but in thoſe of *credit*, words that impute want of *ability only* are not actionable: As to ſay of a juſtice of peace, "He is an aſs; he is a beetle-headed juſtice," is not actionable: And the reaſon is that a man cannot help his want of ability, as he may his want of honeſty: But even in offices of *credit*, words that import *corruption or diſhoneſty* are actionable. Salk. 695.

* 4. As to action of *ſcandalum magnatum*, it is enacted by ſtat. *Weſt.* "That if any one ſlander a peer, or other great perſon, that he ſhall be puniſhed by impriſonment." And by ſtat. 2. *Rich.* 2. "The perſon injured may in a *qui tam* action recover damages for the offence." * P. 234.

2. *Of Words not in themſelves actionable, but which become ſo by reaſon of ſome ſpecial Damage. As Loſs of Preferment, Marriage, &c.*

1. For the loſs of *preferment*.

As if a divine is to be preſented to a benefice, and one to defeat him of it, ſays to the patron, "That he is an heretic, or a baſtard, or that he is excommunicated; by which the patron refuſes to preſent him, and he loſes his preferment, he may have his action for that ſlander. 4 Co. 17. a.

So where defendant ſaid of the plaintiff (who was ſon and heir of his father) "That he was a baſtard." An action was adjudged to lie, for it tended to diſinherit him of the lands which would deſcend to him from his father: But it was further reſolved, that if defendant pretended that the plaintiff was a baſtard, and he himſelf the next heir, no action lies, for it is a claim of right. Baniſter v. Baniſter. cit. 4 Co. 17.

"And

" And in ſuch caſe it is not neceſſary that the damage ariſ-
" ing from the words be *certain* and *immediate*, for if it be
" *probable* and *remote*, it will maintain the action."

*P. 235. Vaughan v. Ellis. Cro. Car. 213. * As where the action was for calling the plaintiff a baſtard; and it was moved in arreſt of judgment, that he ſhould ſhew ſome ſpecial damage from a preſent title and poſſeſſion, whereas he had only declared that his grandfather was tenant in tail, and his father had divers ſons living, of which he was the youngeſt; but there being a poſſibility that he might inherit, and he proving that he had been offered a ſum of money for his poſſibility, the action was adjudged to lie.

2. For the *Loſs of Buſineſs* or *Trade*.

Levett's Caſe. Cro. Eliz. 289. As where the plaintiff declared that he was an innkeeper, and the defendant ſaid to him, " Thy houſe is infected with the pox, and thy wife was laid of the pox." Theſe words were adjudged to be actionable, for it was a diſcredit to the plaintiff, and gueſts would not reſort thither.

" But in ſuch caſe it muſt appear that the words from
" whence the injury may ariſe, were *uſed in a converſation*,
" *concerning the plaintiff's trade or buſineſs.*"

Savage v. Robery. Salk. 694. For where plaintiff declared, that he was a trader and that defendant ſaid to him, " You are a cheat, and have been a cheat for divers years," judgment was arreſted, after a verdict for the plaintiff, it not appearing that there was a colloquium of the plaintiff's trade at the time.

" Though where the words muſt clearly refer to the plain-
*P. 236. " tiff's trade or calling, they ſhall * be actionable though no
" colloquium is found."

Reeve v. Holgate. 2 Lev. 62. As where the plaintiff was a *malſter* and *dealer in corn*, and defendant ſaid of him, " Don't deal with him, he's a cheat and has cheated all the farmers at *Epping*, and dares not ſhew his face there, and now is come to cheat at *Hatfield*." Theſe words evidently referring to plaintiff's trade were held to be actionable, though the ſpecial verdict which found them found alſo no colloquium of plaintiff's trade.

3. *For Loſs of Marriage.*

Davis v. Gardiner. 4 Co. 16. b. Poph. 76. S. C. As where plaintiff declared, that ſhe being a virgin of good fame, was going to be married to one *Antony Elcock* and that defendant ſaid of her, " I know *Davis*'s daughter ſhe dwelt in *Cheapſide*, and there was a grocer that did get her with child." By reaſon of which words the ſaid *Elcock* refuſed to marry her. Plaintiff recovered on account of the ſpecial damage.

Holwood v. Hopkins. Cro. Eliz. 787. But in this caſe a diſtinction is taken, that in order to make ſuch words actionable, they *muſt be ſpoken to the perſon who was in communication to have married the perſon who was defamed*, for if ſpoken generally the action will not lie.

Graves v. Blanchet. Salk. 699. Id. 694. S. P. To call a woman whore, or words tantamount, is a matter *of ſpiritual cognizance*, and not actionable at common law unleſs under the circumſtances above.

4. *F*

*4. *For the Loſs of Service.* *P. 237.

As if a perſon to prevent a ſervant getting a place gives him a falſe character, it is actionable. Per Lord Mansfield. Bull.N.P.8.

But in ſuch caſe it muſt appear to have been given *maliciouſly and with an ill intention*; for though the character given is *falſe*, yet if no *malice* appears, the action will not lie. Weatherſtone v. Hawkins. Hill.26 G.3. Term Rep. 110.

3d. "But it is to be obſerved, that words in themſelves "actionable may nevertheleſs not bear an action from the "particular circumſtances under which they are ſpoken or "uſed."

1. *As if words are ſpoken out of a Motive of Friendſhip, and without intention to defame.*

As where the action was for ſaying of the plaintiff, who was a tradeſman, "He cannot ſtand it long, he will be a bankrupt ſoon," and ſpecial damage was laid in the declaration, *viz.* "That one *Lane* refuſed to truſt the plaintiff for an horſe." *Lane*, the perſon named in the declaration, was the only witneſs called for the plaintiff, and it appearing from his evidence that the words were *not ſpoken maliciouſly*, but in confidence and *out of friendſhip* to *Lane*, and only by way of friendly warning not to truſt the plaintiff for the horſe. *Pratt* ch. juſt. directed the jury that though the words were actionable, yet if they ſhould be of opinion that they were not ſpoken out of malice, but in the *manner beforementioned, that they ought to find the defendant not guilty, and they did ſo accordingly. Herver v. Dowſon. Sittings after Trin. 5 G. 3. Bull.N.P.8. *P. 238.

2. "If they are ſpoken *privately and in confidence*."

As where a ſervant brought an action againſt her former miſtreſs, for ſaying to a perſon who came to enquire her character, "That ſhe was ſaucy and impertinent, and often lay out of her own bed, but that ſhe was a clean girl, and did her work well:" Though the plaintiff proved that ſhe was by this means prevented from getting a place, yet *per Lord Mansfield*, this is not to be conſidered as an action in the common way for defamation by words, but *the giſt of it muſt be malice*, which is not implied from the occaſion of ſpeaking, but ſhould be directly proved. *This was a confidential declaration*, and ought not to have been diſcloſed. Edmonſon v. Stephenſon & ux. Sittings after Eaſt. 6 G. 3. Bull. N. P. 8.

3. "If *the Words have been uſed in the Courſe of Legal Proceedings*, no action will lie for them."

As was adjudged in this caſe, that if one exhibits articles of peace againſt any perſon containing divers great abuſes and miſdemeaners, in order to have him bound to his good behaviour: The party accuſed ſhall not have for any matter contained in ſuch articles any action on the caſe, for the perſon has purſued the due courſe of juſtice, and if thoſe actions Cutler v. Dixon. Co. Rep. 146.

tions

*P. 239. tions were permitted, those who have just cause of *complaint would not dare to complain for fear of vexation.

"But though the defendant may in such case be justified, "yet if he does *not confine himself to legal form*, but *charges "crimes not properly cognizable by that jurisdiction to which he "applies*, an action will lie for those charges."

Buckley v. Wood. 4 Co. 14. b. Cro. Eliz. 230. S. C. As where *Wood*, the defendant in this action had exhibited articles in the *Star Chamber* against Sir *R. Buckley*, and in them *charged several matters not cognizable in that court*, and had often *declared in the country that the articles exhibited were true*. It was resolved, that for any matter contained in the bill which was examinable in that court, that no action lay though it was false, because it was in the course of justice; but, 2dly, that for the matters not cognizable in that court, that the action lay as being a slander on a person which he could not defend. 3d, That though for preferring false matter to a competent jurisdiction, that no action lies, yet that if he talks at large in the country, and avers his charges to be true, that an action lies.

S. C. It was further held in this case, that if a witness goes beyond the point in issue, and slanders a third person, that this action lies against him.

Bull. N. P. 5. Note, That if two persons say the same words, yet *a joint action* of slander will not lie against them.

*P. 240. *Having thus considered slander by words, I shall proceed to

2dly. SLANDER BY WRITING, *or Libel.*

Under this head I shall consider, 1st. The nature of libels. 2. What constitutes the offence, and who are liable to punishment for them.

1. *Of the Nature of Libels.*

Slander by libel differs only from slander by words, that it is delivered *in writing or printing*. But the offence of a libel is more heinous as its circulation of the slander is more extensive, and derives too an additional degree of malignity from its being done premeditatedly.

The rules, therefore, before laid down in respect to slander by words, will be found to apply equally in the case of libels. Which I shall first consider; and secondly, the more particular nature of libels themselves.

As 1st, "To charge a person with any crime which may "subject him to the danger of legal punishment is a libel "and actionable."

Bull. N. P. 9. As to charge a person with sodomitical practices.

2. "To alledge any matter which may be the means of "excluding him from society."

As

*As where plaintiff brought his action againſt the defendant for a libel, charging him with having the itch and ſtinking of brimſtone. The plaintiff recovered in this action, the words charging him with diſeaſes which rendered him unfit for ſociety. *P. 241. Villers v. Monſby. 2 Wilſ. 403.

3. "So where the writing is ſuch *as will injure a man in "his trade or profeſſion*, it is a libel for which this action lies."

As where plaintiff declared, that he was gunmaker to the Prince of *Wales*, and it having been inſerted in the newſpapers that he had preſented a gun to the Prince of *Wales*, two feet ſix inches long which would carry as far as one a foot longer. The defendant intending to injure him in his trade, had publiſhed another paragraph in the newſpapers, mentioning this circumſtance, and adding, "That he adviſed all gentlemen to be cautious of dealing with him, as he would not engage with any artiſt in town, nor did ever make ſuch experiment (except out of a leather gun) as any gentleman might be ſatisfied at the *Croſs-guns, Long-acre.*" This advertiſement tending to injure plaintiff's reputation as an artiſt, was adjudged to be actionable, though it was agreed that for one tradeſman to pretend to more ſkill than another would not be ſo. Harman v. Delany. 2 Stra. 898. Fitzgib. 121. S. C.

4. "So where the writing injures the domeſtic peace and happineſs of a family, charging a man's children with immorality or incontinence." As here that the proſecutor's daughter was of looſe manners, and had gone up to *London* to be delivered of a baſtard. This action was held to lie. Rex v. Benfield & Saunders. 2 Burr. 980. *P. 242.

5. "But nothing ſhall be conſtrued a libel which is neceſſary in the courſe of legal proceedings, and is relevant to the matter which is before the court."

As where the plaintiff declared, "That he being a doctor of laws and vicar general to the biſhop of *Lincoln*, that defendant had preſented and cauſed to be printed a *petition to parliament*, charging him with divers crimes, as extortion, oppreſſion and corruption in his office:" The action was held not to lie, the petition being the neceſſary and uſual mode of complaint to parliament for any redreſs of grievance. Lake v. King. 1 Saund. 131.

So where the action was brought for a libel, and the office as laid was, "That defendant in a certain affidavit before the court had ſaid, that the plaintiff in a former affidavit againſt the defendant had *ſworn falſely*." The court held that the action would not lie, for in every diſpute in a court of juſtice, where one by affidavit charges a thing, and the other denies it, the charges muſt be contradictory, and there muſt be an affirmation of falſehood. This therefore being neceſſary in the courſe of legal proceeding, that no action would lie for it. Aſtley Bart. v. Younge. 2 Burr. 817.

6. "So no matter which is ſtated in any memorial or petition for the redreſs of grievances, and addreſſed in the proper channel, by which ſuch redreſs may be had, that is

"to

*P. 243. " *to the perſons only who have power to give ſuch re-
" dreſs, ſhall be deemed libellous."

Rex v. Baillie. Mich. 20 G. 3. B. R.

As where defendant being deputy governor of *Greenwich Hoſpital*, wrote a large volume, of which he alſo *printed ſeveral copies*, containing an account of the abuſes of the hoſpital, and treating the characters of many of the officers of the hoſpital, and Lord *Sandwich* in particular, who was then firſt Lord of the *Admiralty*, with much aſperity. He diſtributed the copies *to the governors of the hoſpital only*, but it did not appear that he had given a copy to any other perſon. On a rule for an information for this as a libel, Lord *Mansfield* held, that this diſtribution of the copies to the perſons only, who were from their ſituation called on to redreſs the grievances, and had from their ſituation power to do it, was *not a publication* ſufficient to make that a libel, and he ſeemed to think that whether the paper was printed or in manuſcript under theſe circumſtances made no difference.

Peacock v. Reynell. 2 Brownl. 151.

" As *words* ſpoken without an intention to be made pub-
" lic, as in confidence or privately, are not actionable." So if a perſon in a *private letter* expoſtulates with another on his vices, it is no *libel*.

Caſe de Libellis Famoſis. 5 Co. 125 Halliwood's Caſe cited. 5 Co. 125. b.

And note, That a libel againſt a *magiſtrate* is a higher offence than againſt a private perſon, for it is a ſcandal upon government.

Therefore if one finds a libel againſt a private perſon, he ought to deſtroy it, or to *bring it to a magiſtrate. But if it is againſt a public perſon, he ought to bring it to a magiſtrate, that the offender may be found out.

*P. 244.

2d. *As to the more particular Nature of Libels.*

Hurt's Caſe. Trin. 12 Ann. 1 Hawk. P. C. 194. 2 Atk. 470. S. P.

1. A defamatory writing, expreſſing only the *initials*, *one or two letters of a perſon's name*, but in ſuch manner as obviouſly and indubitably referring to the perſon, and ſo that it would be nonſenſe if ſtrained to any other meaning, is as properly a libel as if the whole name had been mentioned at large, for it would bring the utmoſt contempt on the law to ſuffer its juſtice to be eluded by ſuch trifling evaſions, and that a writing underſtood by the meaneſt capacity could not be ſo by the judge and jury.

2. " A writing though with *feigned names*, has been con-
" ſtrued a libel."

Per Ld. Hardwicke 2 Atk. 470.

As was the caſe of Mrs. *Dodd*, who printed a letter abuſing the late king, under the title of *Memoirs of Sophia of Perſia*, though the whole letter was ſo couched in feigned names, yet the jury found the publiſher guilty.

Hick's Caſe. Hob. 215. Poph. 139. S. C.

3d. " A writing, though not directly charging crime,
" may be a libel, as if done in a taunting or ironical man-
" ner." As after recounting any acts of public charity for the perſon to ſay, " You will not play the *Jew* or hypocrite as

and ſo go on in a ſtrain of ridicule, to inſinuate that what he did proceeded from vain-glory. *P. 245.

4. It is not material whether the libel be *true* or *falſe*, or whether the *party* againſt whom it is levelled is *of good or evil fame*; for the party grieved ought to complain for every injury done to him to the ordinary courſe of law, and not have recourſe to methods of redreſs by ſlanderous publications. Caſe de Libel. famoſ. 5 Co. 125. b. 4 Reſ.

5. A writing may be a libel, though the perſon libelled is *dead*. For it ſtirs up ſome of the perſon's family to revenge this attack on his memory. And if he be a magiſtrate who is dead who has been ſlandered, it is puniſhable as a ſlander on the government. Caſ. de Libel. famoſ. 5 Co. 125. 2 Reſ.

For it is neceſſary to be obſerved, that libels are puniſhable by *information* and *indictment*, as well as by *action*, that is conſidering them as an offence againſt the public peace and good order of the ſtate, and thereon is founded the diſtinction, that if any perſon is ſlandered by libel, *he* may have his *action* as well as an information or indictment. But a libel reflecting on a perſon dead, or the conduct of the king's miniſters or government, *without any particular application*, is puniſhable only by *information or indictment*, as a matter of public not of individual concern.

As was the caſe here of an information againſt the defendant, "For publiſhing an advertiſement ſuggeſting that many of his majeſty's ſubjects had been murdered by his majeſty's troops in *America*, and propoſing a *ſubſcription for raiſing a ſum of money for the ſupport of their wives and children," the people of *America* then being in open rebellion to this country. The defendant was found guilty, fined and impriſoned. Rex v. Horne. Cowp. 672. *P. 246.

"And on the ſame grounds, though the writing may not convey any ſlander againſt *any perſon*, yet may it be a libel, from having an *evil public tendency* to *corrupt the manners of the people.*"

As in this caſe, where an infamous and obſcene book, which had been publiſhed by the defendant, was, on an information and on ſolemn argument, adjudged to be a libel, and he was convicted and ſtood in the pillory. Rex v. Curl. 2 Stra. 788. Rex v. Hill. Ibid. cit.

"So for the ſame reaſon, publications levelled againſt the *eſtabliſhed religion* have been held to be libels."

As where defendant was convicted of having publiſhed four blaſphemous diſcourſes on the miracles of our Saviour, and attempting to move in arreſt of judgment, the court ſaid they would not ſuffer it to be debated, whether to write againſt chriſtianity was not an offence puniſhable in the temporal courts at common law. Rex v. Woolſton. 2 Stra. 834. Fitzgib. 65. S. C.

And on the ſimilar principles of public concern. A *treaſe of hereditary right* was held to be a libel, though it contained no libel upon any part of the then ſubſiſting government. Regina v. Bedford. Mich. 12 Ann. cit. 2 Stra. 789.

"And

*P. 247. *" And in like manner any public reflection *on the administration of justice* is libellous."

Rex v. Watson & al. Hil. 28 G. 3. 2 Term. Rep. 199.

As where one *Hurry* having been maliciously prosecuted for perjury by defendant and acquitted, and having afterwards recovered large damages for the malicious prosecution from *Watson*, the corporation of *Norwich*, of which he was a member, made *an order in their books* voting to him 2,300*l.* in consideration of the verdict against him, and declaring that it was done in consideration of his being actuated by motives of public justice, and preserving the rights of the corporation, and supporting the honour and credit of the chief magistrate. The court held this to be a libel on their proceedings and the administration of justice, and made a rule absolute for an information against the defendants.

Though these cases on *indictments* and *informations* for libels do not properly belong to this treatise, yet being necessary to the clear understanding of the doctrine under this head, I have thought it not improper to insert those now mentioned, and the other cases on the same head, premising those cases on the rules adopted by the court in granting informations.

Rex v. Miles. Dougl. 271.

As 1st, It is a general rule that the court will not grant an information for a private libel, charging any person with an offence, unless such person *will deny the charges upon the oath.*

Rex v. Bickerton. 1 Stra. 498.

For if the party admits the libel to be true, or does not deny it, though being true does * not excuse the libel, yet it is sufficient to induce the court to leave the party to his remedy by *indictment.*

*P. 248.

Rex v. Haswell & Bate Dougl. 572.

But to this certain exceptions have been admitted, 1. Where the libel is founded on charging the prosecutor with *words delivered in parliament*, for such cannot be questioned (*Bill of Rights*, 1 *W. & M. sess.* 2. *c.* 2. *art.* 9) 2. Where that charge is only general. 3dly, Where the party libelled is at such a distance that he cannot be had to swear, when the information is moved for by a person on his behalf.

Per Lord Mansfield. 5 Burr. 2666.

And note, That what is or is not a libel is *matter of law* upon the face of the record; on which after conviction the defendant may move in arrest of judgment, if the paper is *not a libel.*

2. *Wherein the Offence of Libels consists, and who are liable to Punishment for them.*

1. " As the offence of a libel consists in being the means " of propagating slander, it is essential to a libel *that it be* " *published.*"

Rex v. Fitter & Carr. 2 Keb. 502.

For in an information for a libel in this case it was held that copies of a libel being found in the defendant's chamber was no publication or offence, *without discoursing of it, or delivering it out.*

*So on an information for a libel in this case, it was resolved, that every one who shall be convicted of a libel ought to be a contriver of it, or a procurer of contriving it, or a malicious publisher of it, knowing it to be a libel. For if one reads a libel, or hears it read, it is no publication, as before he reads it or hears it, he cannot know that it is a libel, but if after hearing or reading it, he repeats any part of it to others, or reads it to them, it is a publication of it; but if he writes a copy of it, and does not publish it to others, it is no publication of it. But this might be evidence rather against him, unless he delivered the copy to a magistrate. *P. 249. John Lamb's Case. 9 Co. 59. b.

" But *writing* a libel seems to be sufficient, though the " person was not concerned in the publication."

For where in this case the jury found, that the defendant did *write* the libel, but that it was dictated to him by a person unknown to him and to the jury, and that the stranger dictated the whole of the subject matter which the defendant wrote. The court held the defendant to be guilty, the writing being the essential part, a *making* of the libel, and so different from *transcribing* of it, as in the last case, which is not of itself an offence. Rex v. Paine. Carth. 405. 5 Mod. 163. S. C.

2. Proof of the sale of a libel in the shop of a printer, is *prima facie* evidence, to convict the owner of the shop of having published the libel, and must stand till contradicted, explained, or exculpated by contrary evidence; and though the copies have been sold by his servant without his knowledge, and he afterwards stops the sale, this can only be offered in mitigation of punishment. Rex v. Almon. 5 Burr. 2687. *P. 250.

3. If a man sends a libel to *London* to be published, it is act in *London* if the publication be there. Rex v. Middleton. 1 Stra. 77.

4. And as to the *mode of publishing* a libel, it is resolved, at it may be published, 1. *Traditione, or* by handing about pies of it. 2. *Verbis aut cantilenis*, reading or singing it the presence of others. Caf. de fam. Libel. 5 Co. 125.

But repeating part of a libel in merriment without malice, has been held not to be a publishing. But singing a in ridicule, or slandering the person's character, was in case deemed a sufficient publication. Want's Case. Moor 627. Rex v. Benfield & al. 2 Burr. 980.

d. The third species of slander is called

LIBEL SINE SCRIPTIS.

s by pictures; raising a gallows before a man's door, hanging him in effigy, and such like. 5 Co. 125.

t as to signs and pictures it seems necessary to shew by per innendoes and averments the defendant's meaning, they particularly applied to the plaintiff, and that some al damage has followed. 3 Black. Com. 126.

2. OF

P. 251. 2. OF THE RULES OF CONSTRUCTION *adopted by the Court in Case of Slanderous Words.*

Bradley v. Meſſon. Mich. 10 G. 2. Bull. N. P. 4.

The old rule in the conſtruction of words was that they were always to be taken in *mitiori ſenſu*, but this is now exploded, and the rule is, that they ſhall be taken in that ſenſe in which they would be underſtood by thoſe who hear and read them.

But many former rules of conſtruction agree with this, as

1ſt. "That all the ſentence is to be taken together, for "though part of the words may be actionable, yet they "may be ſo explained by the reſt as not to bear an action."

Brittridge's Caſe. 4 Co. 19.

As where the words were, "*Brittridge* is a perjured old knave, and that appears from a ſtake parting the grounds of *H. Martin* and Mr. *Wright*." After a verdict for the plaintiff the judgment was arreſted, for though the firſt words "perjured old knave" are actionable, yet it muſt be perjury in a court of juſtice, which is actionable, but here the ſubſequent words explain the words clearly not to mean judicial perjury.

2. "Where words are ſpoken which bear an imputation "of ſlander, or with an intention to defame, the court will "not ſtrain to find an innocent meaning for them."

Ward v. Reynolds. Gilb. Rep. 243. *P. 252

As where defendant ſaid to the plaintiff, "How did your huſband die?" plaintiff *anſwered, "As you may, if it pleaſe God." Defendant replied, "No, he died of a wound you gave him." On *not guilty* pleaded, plaintiff had a verdict, when it was moved in arreſt of judgment, that the words might have an innocent meaning, as that the ſtroke might have been given *by accident*, but the court ſaid, that the words bore a ſcandalous meaning, and that they would not endeavour to find out, how they might be ſpoken with an innocent meaning.

"So on the other hand they will not put a forced con "ſtruction of guilt on words which may bear an innocent "meaning."

Box v. Burnaby. Hob. 116.

As where the words were of an attorney, "He is a common maintainer of ſuits." They were held not to be actionable, for to maintain ſuits is his buſineſs, and the word ſhall not be conſtrued to import a charge of *maintenance* when applied to him.

3. "The words ſhould import *a direct charge* of a ſlanderous nature, not by inference or concluſion, or the court "will not hold them to be actionable."

Stanhope v. Blith. 4 Co. 15. a.

As where the words were, "*M. Stanhope* hath but one manor, and that he got by ſwearing and forſwearing." The words were adjudged not to be actionable, 1. Becauſe they were too general. 2. Becauſe they did not charge the plaintiff himſelf with ſwearing and forſwearing, for he might have got the manor ſo, and yet not be privy to the ſwearing or forſwearing.

"So the *perſon ſlandered* muſt therefore always be *certain*, *P. 253.
"ſo that there can be no doubt as to the perſon meant."

As if one was to ſay, "One of the ſervants of *J. S.* (he having many) is a notorious felon or traitor." No action lies, on account of the uncertainty of the perſon. But if the perſon is once named, as if after converſing about *J. S.* one ſays, "He is a notorious thief." This is actionable, for the perſon meant may be ſufficiently aſcertained by the innuendo, which in the former caſe could not be done. 4 Co. 17. b.

4. "Where words are uſed with an intention to ſlander, "though the offence which the defendant intended to lay "to the plaintiff's charge is improperly expreſſed, yet may "the words be actionable."

As where defendant ſaid of the plaintiff, "*Twaites* has "hired ſeveral perſons to make falſe powers to receive ſea-"mens' wages." This was conſtrued to convey a charge of *forgery*, and to be actionable, though the word *powers* is general, and may not properly mean *letters of attorney*, yet being ſo uſed in common ſpeech, it ſhall be conſtrued as intending to defame. Twaites v. Shaw. Gilb. Rep. 216.

*3. I ſhall now proceed to conſider the *P. 254.

PLEADINGS.

And 1ſt, Thoſe on the part of the

PLAINTIFF.

1. "Where the words or ſentence does not *of itſelf* contain a charge of a ſlanderous nature, without words of *reference*, or *explanatory of the meaning, or application*, it may be ſupplied by proper *innuendos* in the declaration, as to matters or perſons referred to."

"But as to how far the *innuendos* are to be allowed it has been reſolved:"

1. "The office of the *innuendo* being to *ſupply* the abſence of ſomething neceſſary to complete the ſentence, and ſhew the application of the words, it can never be admitted to *extend* their meaning beyond the import of the words themſelves."

For where the words were, "Maſter *Barham* did burn my "barn," with an *innuendo*, "*a barn full of corn*," (which is true if there is corn in it, or it be parcel of the dwelling-houſe) The court would not ſuffer the *innuendo* to imply, that there was corn in it, when the word would not of itſelf bear ſo extenſive a meaning. Barham's Caſe. 4 Co. 20. a. Caſtleman v. Hobbs. Cro. Eliz. 428. S. P.

"So where the *perſon* is uncertain an *innuendo* ſhall not make him certain."

As

*P. 255. 4 Co. 27. b.

*As if one ſays, "I know one near or about *J. S.* who is a notorious thief." The perſon really meant cannot be ſupplied by an innuendo, when there has been no previous converſation about him. For the office of the innuendo is to contain and deſign the perſon who was named in certain before, and ſtands in the place of a *prædict.* And therefore without ſomething to refer to cannot be made certain, for it would be inconvenient that actions might be maintained by imagination of an intent, which does not appear by the words on which the action is founded, but which is uncertain, and ſubject to deceivable conjecture.

3. "So neither ſhall the words if uſed generally be extended by the innuendo in the declaration to apply to any "*particular thing*, ſo as to induce guilt from thence."

Thomas v. Axworth. Hob. 2. Hervey v. Duckins. Hob. 45. S.P.

As where the words were "He forged a warrant" *innuendo* a certain warrant, by which the ſheriff was commanded to take *Margaret Hogg*, &c. It was held that the innuendo could not ſpecify in ſuch manner that which was generally alledged.

2. "The next part of the declaration material to the action is the *averment*. This is where the words for which "the action or libel is brought are only criminal by reference "to ſome other fact, which therefore conſtitutes the ground "of the action, or is neceſſary to maintain it; in ſuch caſe "this matter muſt be expreſsly averred in the declaration.

*P. 256.

*As in the caſe of *traders*, certain words are actionable applied to them, which are not ſo when uſed to others, as to call one a bankrupt, &c. In ſuch caſe it is neceſſary to aver a *colloquium*, concerning ſuch perſon *as a trader*, and that the words were uſed with that application.

Bland's Caſe. Hob. 309.

So where plaintiff brought an action for defendant, having ſaid, "That he was indicted for felony at a ſeſſion holden," &c. but did not aver that he had not been indicted after a verdict for the plaintiff judgment was arreſted for want of this averment, for if he was not indicted there was no crime.

Lowfield v. Bancroft. 2 Stra. 934.

In like manner in the caſe of *libels*, the ſame averments are neceſſary, and in this caſe judgment was arreſted, becauſe it was not laid that the judgment was *of and concerning the plaintiff.*

Rex v. Alderton. Sayer's Rep. 280.

So where the libel was, an advertiſement reciting certain orders made for collecting money on account of the diſtemper among the horned cattle in *Suffolk*, and it charged that the money ſo collected had been improperly applied, and the information charged this to be a libel *on the juſtices of Suffolk*, but in the body of the libel no mention was made of the juſtices of *Suffolk*, nor did the information in the introduction part ſay that it was a libel *of and concerning them*, and though in the body of the information when any order was mentioned, there was an *innuendo*, that it was an order of the juſtices of *Suffolk*: but judgment was arreſted, for want

*the averment, the innuendos not explaining sufficiently the matter, there being nothing to refer to. *P. 257.

But where the information was for a libel, "*of and concerning the king's government*;" these words were adjudged to be a sufficient introductory averment to support the information, by reference of the subsequent matter to them. Rex v. Horne. Cowp. 672.

"But where the words charge a crime, which words are "*of themselves actionable*, it seems that in such case, an "averment, that the crime was not committed, is not neces-"sary."

As where the words were, "I will call him in question for poisoning my aunt, and I make no doubt to prove it." After verdict for the plaintiff it was moved in arrest of judgment, that it was not averred, that in fact the defendant's aunt was poisoned: But *curia contra*, for the plaintiff's character is impeached, though he never did such a fact. Webb v. Poor. Cro. Eliz. 569.

3. In an action by a *trader* for actionable words, as for calling him *bankrupt* for example, the declaration should state "That he was a trader, and used the trade of, *&c.*" For where in this case plaintiff only declared that he used the *art and mystery* of a baker; judgment was arrested, as it might be only for the use of his own family. Hawkins v. Cutts. Hutt. 49.

So he should also state in his declaration "That *he gained his living* by buying and selling." For in this case for want of such averment judgment was arrested. For such traders only are within the bankrupt laws. Emerson v. ——. 1 Sid. 299.

*So the declaration should state, "That *at the time of the words spoken* he was a trader." *P. 258.

For where in this case the plaintiff only declared, "That he was of good fame, *& per multos annos retroactos*, was a merchant, *&c.*" The court inclined to think the declaration ill, as the words did not sufficiently shew that he was *then* a merchant, as he might have been so for many years past, but have left off trade. Dotter v. Ford. Cro. Eliz. 794.

And these several matters must be proved at the trial.

4. If an action is brought for calling the plaintiff's wife a bawd, *per quod J. S.* left off coming to the house, the special damage being the gift of the action, which is the husband's only, it ought not to be laid *ad damnum ipsorum*: But where the action is brought for words in themselves actionable, and no special damage laid, there such conclusion is right, for the action survives. Coleman & ux. v. Harcourt. 1 Lev. 140. Grove & ux. v. Hart. Tr. 25 G. 2. Bull. N. P. 7.

†And *note*, That saying generally *per quod* several persons left the house, without naming any in particular, is not special damage. † Ibid.

5. In setting out the words, or the tenor of words, in the declaration in this action, there is a difference between words spoken and words written. Of words spoken there cannot be a tenor, for there is no original to compare them to as in the case of words written; therefore in the declaration for Regina v. Drake. Salk. 660.

words ſpoken, variance in the omiſſion or addition of a word
*P. 259. is not material, *it is ſufficient if ſo many be proved and found as are actionable. But it is otherwiſe in the caſe of words written, for though in deſcribing a libel, or other writing, there are two ways of pleading, either by the words, ſaying *cujus tenor ſequitur*, or in *hæc verba*, &c. or by the ſenſe; if you declare on the words themſelves, any variance or miſtake is fatal, for *tenor* means a tranſcript or true copy. But in declaring on the ſenſe ſuch an adherence is not required, and a variance is not fatal.

Id. Therefore where the declaration was for a libel *ſecundum tenorem ſequentem*, and in ſetting out the ſentence, *nor* was inſerted for *not*, though the ſenſe remained the ſame, the variance was held to be fatal.

6. "As it is eſſential to a libel that it be *publiſhed*, it is "therefore neceſſary that that ſhould appear from the decla- "ration, but the word *publiſhed* is not eſſential, nor is there "any technical form of words neceſſary, if it appears by "any means either from the particular caſe, or in any man- "ner that the libel was publiſhed."

Baldwin v. Elphinſtone, in Excheq. Chamb. 2 Black. Rep. 1037. *P. 260. As where the count in the declaration was "*for printing, or cauſing to be printed* a libel againſt the defendant in error, *in a newſpaper*," and the error aſſigned was the want of the averment *of publication*. The court held that the fact of *printing* a libel, though it might be an innocent act, yet unleſs qualified by circumſtances, ſhould *prima facie* be underſtood to be a *publiſhing*, as it muſt be delivered to the *compoſitor, workmen, &c. But printing in a *newſpaper* admits of no doubt on the face of it, and ſhall be intended to be a publication, unleſs defendant ſhall ſhew that it was ſuppreſſed and never publiſhed; the court therefore gave judgment for the defendant in error.

Carpenter v. Farrant. Mich. 10 G. 2. B. R. Bull. N. P. 8. 7. Plaintiff need not in his declaration, aver, "That the words or charge was *not true*, for that is ſupplied by the general allegation in the declaration, that the defendant publiſhed them *falſely and maliciouſly*.

2. OF THE PLEADINGS *on the Part of the* DEFENDANT.

1. The *general iſſue* in this action is *not guilty*, or a denial that the defendant ſpoke the words in queſtion.

2. Several ſpecial *pleas in juſtification* are good, which admit the fact but deny the ſlander or defamatory intention.

Brook v. Montague. Cro. Jac. 91. As the defendant may plead that the words were ſpoken by him as counſel in a cauſe, and that they were pertinent to the matter in queſtion; ſo he may juſtify the ſpeaking them through concern, or the reading them as a ſtory out of a hiſtory; or he may ſhew from the dialogue that they were ſpoken in a ſenſe not defamatory; or he may give theſe matters in evidence on the general iſſue, for they prove him not guilty of the words *maliciouſly*.

"An

* " And the defendant may juſtify by ſhewing the *applica-* *P. 261.
" *tion* of the words uſed not to be ſlanderous, though they
" would otherwiſe import ſlander."

As where they were for calling plaintiff " murderer." 4 Co. 13. b. 14. a.
Defendant may ſhew that it was in a converſation concerning the killing of hares, of which plaintiff having ſaid that he had killed ſo many; that defendant then ſaid he was a murderer, but meant of hares.

" But it is no juſtification of ſlanderous words, that the
" defendant heard them from another perſon, for every one
" is anſwerable for the ſlander which he himſelf propagates
" of another."

As where this action was brought by the captain of a ſhip againſt a merchant of *Briſtol*, for ſaying, " That his veſſel was ſeized, and he put into priſon at ———, for ſmuggling corn." Ch. Juſt. *Lee* held that proof of the defendant's having heard it read out of a letter, and that he only reported the ſtory, was no juſtification, but that he was anſwerable for the reports which he propagated, and the jury gave 150*l.* damages. Anon. G Hall, 1752. Bull. N. P. 10.

So it is no juſtification of ſlanderous words, that defendant *ſuſpecting* the plaintiff to have been guilty of the fact, concerning which the words were ſpoken, had ſo uſed them concerning him. Powell v. Plunkett. Cro. Car. 38.

3. " Defendant may plead that the *words were true.* 5 Co 125. b.
" For if ſo it is *damnum abſque* * *injuriâ*. And the truth of Dougl. 375.
" the words muſt always *be pleaded*. But in the caſe of a *P. 262.
" *libel* the truth of the words can neither be pleaded or
" given in evidence."

For where in an action for words the defendant *pleaded not guilty*, and offered to prove *the words to be true* in mitigation of damages, the chief juſtice refuſed to permit him, ſaying, that the judges had then come to a reſolution never to permit the truth of the words to be given in evidence under the general iſſue, but that it ſhould always be pleaded, whereby the plaintiff might be prepared to defend himſelf, as well as prepared to prove the ſpeaking of the words. Underwood v. Parks. 2 Stra. 1200.

" But if plaintiff, after proving the words laid, goes in-
" to evidence of other words, which ſhew defendant's ill-
" will to him, defendant ſhall be allowed to give the truth
" of *theſe* words in evidence."

As where the plaintiff brought an action againſt the defendant for ſaying " He was a buggerer, and that he caught him in the fact." After proving the words, plaintiff gave in evidence, that at another time defendant had ſaid, " That he was guilty of ſodomitical practices." *Juſt. Burnet* permitted the defendant to give the truth of theſe words in evidence, for the action not being brought for the ſpeaking of *them*, defendant had no opportunity of pleading that they were true, and being given in evidence in aggravation, Colliſon v. Loder, at Oxford 1750. Bull. N. P.

defendant ought to be permitted to ſhew that they were true in mitigation.

*P. 263. *4. "A *Recovery of Damages in a former Action for the ſame Words*, is a good plea in bar."

Per Cur. Caſ. K. B. 544. And where a perſon has once recovered damages in an action for words, he cannot afterwards have another action *on account of any ſpecial damage*, as the loſs of preferment, *&c. which may afterwards ariſe in conſequence of the words.*

Gardiner v. Helwis. 3 Lev. 248. Neither ſhall plaintiff by any variation, omiſſion, alteration or explanation, be allowed to vary the words, ſo as to ſuſtain another action, but the former recovery ſhall be held a ſufficient bar.

5. "Another good plea in this action is *accord and ſatisfaction.*"

"But this muſt be executed, and a *valuable conſideration* "*in law.*"

Davis v. Ockham. Style 245. For where to an action for words defendant pleaded an agreement between him and the plaintiff, that the plaintiff having done a treſpaſs, that it was agreed that one action ſhould be ſet againſt another. On demurrer the plea was ruled to be a bad one.

Covill v. Geoffrey. 2 Rep. 96. So where to a like action defendant pleaded an agreement between him and the plaintiff, that he ſhould confeſs the wrong, and aſk plaintiff's pardon on his knees; it was adjudged to be an inſufficient plea, for the conſideration was of no value in law.

*P. 264. *6. The *ſtatute of limitations is* another plea in bar. As to which it is enacted by ſtat. 21 *Jac.* 1. *c.* 16. "That actions for words muſt be commenced within *two years* after "the words have been ſpoken."

Upon this ſtatute it has been held,

Litt. Rep. 342. 1. That it extends not to actions for *ſcandalum magnatum.*

Saunders v. Edwards. 1 Sid. 95. 2. Neither does it extend to caſes in which the ſpecial damage is the giſt of the action, according to this diſtinction, *viz.* where the words are themſelves actionable, there the damages ſhall be held to refer to the words themſelves, and not to any ſpecial damage, and in ſuch caſe the ſtatute is a good bar. But where the words are not actionable, without ſpecial damage, there the ſtatute of limitations is no bar, for the action is for the ſpecial damage ariſing from the words, not for the words themſelves.

Law v. Harwood. Cro. Car. 141. 3. This action extends not to *ſlander of title*, for that is not properly ſlander, but a cauſe of damage, and the ſlander intended by the ſtatute is of the *perſon.*

OF THE EVIDENCE *on the Part of the* PLAINTIFF.

Geare v. Britton. Per Lee Ch. Juſt. Mich. 1746. Bull. N. P. 7. 1. Though *the words are in themſelves actionable*, plaintiff is not at liberty to give evidence of any loſs or injury he has ſuſtained by the ſpeaking of them, unleſs it be ſpecially laid in the declaration. But after he has proved the words as laid, he may

may give evidence of other * expreſſions uſed by the defendant as a proof of his ill-will towards him. *P. 265.

For in ſuch caſe of words actionable, whatever ſpecial damage is laid, plaintiff may go into evidence of it, but not more. As where the words were "You are a thief, and I'll prove you ſo," with a *per quod*, that by reaſon of them one *John Merry*, and divers others, left off dealing with him; the chief juſtice allowed the plaintiff to go into evidence as to *Merry*, but not as to the reſt. Per Ld. Raymond. Browningv. Newman. 1 Stra. 666.

2. But if plaintiff declares for *words not actionable*, and lays ſpecial damage, if the plaintiff does not prove the ſpecial damage laid in the declaration, he muſt be non-ſuited, becauſe the ſpecial damage is the giſt of the action. But where the words are themſelves actionable and ſpecial damage is alſo laid; if the words be proved the jury muſt find for the plaintiff, though the ſpecial damage is not proved. Gueſt v. Loyd. Bull. N. P. 6.

In the caſe of *Browning* v. *Newman* (*ante*) it is ſaid, that where the words are not in themſelves actionable, but the ſpecial damage is the giſt of the action, plaintiff may go into evidence of particular damages not ſpecified in the declaration. But J. *Buller* makes a *quære* if it is ſupported by modern practice.

But in general where ſpecial damage is laid, the evidence muſt correſpond with it. As where the ſpecial damage laid was, loſs of marriage with *J. N.* Lord *Holt* refuſed to let plaintiff go into evidence of loſs of marriage with any body but *J. N.* Anon. 2 Ld. Raym. 1007.

* 3. "It was formerly holden that plaintiff was obliged "to prove the words preciſely as laid, but that ſtrictneſs is "now laid aſide, and it is ſufficient to prove the *ſubſtance* of "them. But the ſenſe as well as manner of ſpeaking them "muſt be the ſame." *P. 266. 2 Roll. Ab. 718. Bull. N. P. 5.

As where the words were laid in the third perſon, "He deſerves to be hanged for a note he forged, on *A.*" Proof that the words were uſed in the ſecond perſon, "*You* deſerve, *&c.*" was held not to ſupport the declaration; for there is a difference between words ſpoken in a paſſion to a man's face, and ſpoken deliberately behind his back, the firſt being more excuſable. Avarillo v. Rogers. G. Hall. Sittings Trin. 1733. before Ld. Mansfield. Bull. N. P. 5.

4. If a colloquium is neceſſary to ſupport the action, (as in the caſe of words applied to a trader) it muſt be proved; and for that fault in this caſe judgment was arreſted. Salk. 694.

So it has been held that if the words are laid to have been ſpoken at a particular place, the place not being laid as a venue, but as a deſcription of the offence, that it ought to be proved. *Sed quære.* Per Juſt. Denton, at Stafford 1729. Bull. N. P. 5.

As in the caſe of a juſtification, which if it be local (as where the words were, "That plaintiff ſtole plate at *Oxford*) it ſeems that the trial ought regularly to be there, but this would be cured by a verdict. Jennings v. Hankin. 2 Lev. 121. Craft v. Borito. Saund. 247.

*P. 267. * 4th. OF THE VERDICT, JUDGMENT AND COSTS.

1. *As to the Verdict and Judgment.*

Compagnon v. Martyn. 2 Black. Rep. 790. & Cas. ibid.

1. Though all the actionable words laid in any one count of the declaration be not proved, yet if any actionable words are proved, damages ſhall be given for thoſe.

† Auger v. Wilkins. Barnes 478. Per Juſtice Buller. Dougl. 362.

† 2. In an action for words where ſome actionable words are laid, and ſome not actionable, and evidence given of both ſets of words, and the jury find a general verdict, if there was any evidence which applied to the bad counts, it being impoſſible to ſay how the jury apportioned the damages to the counts, and which they found; there the court will grant a *venire facias de novo*. But where the evidence applied at the trial only to the good counts, there a general verdict may be altered from the judge's notes.

In Oſborne's Caſe. 10 Co. 130. b.

But if the words are in one count only, the court will intend that ſuch as were not actionable were only added to ſhew the malice of the party, and that the damages only were given for ſuch as were actionable.

Onſlow v. Horne. 3 Wilſ. 177.

But if the jury find a general verdict *on particular counts* and damages entire, and any of them is bad, the judgment in that caſe ſhall be arreſted.

2. As to the *Coſts* in this Action.

It is enacted by ſtat. 21 *Jac.* 1. *c.* 16. "That in actions for
*P. 268. "words if the jury give damages * under forty ſhillings
"that the plaintiff ſhall have no more coſts than damages."

On this ſtatute it has been decided,

Brown v. Gibbons, 1 Salk. 206.

1. Where *the words are not of themſelves actionable*, but the conſequential damages are the giſt of the action (as here for calling plaintiff's wife an whore, *per quod* ſhe loſt her cuſtomers) though the damages are under forty ſhillings, yet plaintiff ſhall have his full coſts; for it is not the words but the ſpecial damage which is the cauſe of action in this caſe.

Id.

But it was further held in this caſe, that though the court are bound by *ſtat.* 21 *Jac.* 1. and cannot increaſe the coſts where the damages are under forty ſhillings; yet the jury are not bound by the ſtatute, and may give 10*l.* coſts where they give but ten pence damages.

Burry v. Perry, 2 Ld. Raym. 1588. 2 Stra. 936. S. C.

2. But where the *words are actionable of themſelves*, and ſpecial damage is laid, if the damages are under forty ſhillings plaintiff ſhall have no more coſts than damages, for the action is *for words*, though the ſpecial damage is alſo laid.

It has been ſaid, that in a caſe of *Denny* v. *Wigg*, *Bull. N. P.* 10. that this doctrine had been over-ruled.

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But in this case from *Blackstone*, which was in the *Common Pleas*, the doctrine was admitted, and held to be the express law on the subject. Collier v. Gaillard, 2 Black. Rep. 1062.

* 3. "So where any other offence is coupled with an "action for words, if there is a general verdict, it is not "within the statute." *P. 269.

As where the action was for words, *and also* for procuring the plaintiff to be taken and brought before a justice of peace: Verdict for the plaintiff, and damages two shillings and sixpence. It was held that the plaintiff should have his full costs, for it was not an action for words only and the rest aggravation, but for two distinct offences. Carter v. Fish. 1 Stra. 645.

4. In an action for words not actionable, plaintiff was non-suited. It was moved that defendant should have no costs, as they should only be given where the plaintiff could have if he recovered, which here he could not, as the words were not actionable; but the court over-ruled the distinction, and defendant had his costs. Drury v. Fitch, Hutt. 16.

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*CHAPTER XI. *P. 270.

THE ACTION OF MALICIOUS PROSECUTION.

THIS is an action whereby damages are recovered for any action against or prosecution of any one, either by suit, indictment, or other legal process, where such action or prosecution appears to arise from any corrupt motive, and to be without any ground or cause for the same.

In treating of this action I shall first consider, for what suits or prosecutions it lies. 2dly, Of actions on the case in the nature of a conspiracy. 3dly, Of the pleadings and evidence. 4. Of the damages.

1st. FOR WHAT SUITS OR PROSECUTIONS THIS ACTION LIES.

1. To bring *a civil action*, though the plaintiff has no grounds, is not actionable, because it is a claim of right, and plaintiff has found pledges of prosecuting, is amerceable *pro falso clamore*, and is liable to costs Savil v. Roberts, Salk. 13.

But

*P. 271. * But to this as a rule are certain exceptions.

1. "As if a person for the purpose of vexation, and of "holding a person in custody, sues him for *a greater debt* "*than is really due.*"

Daw v. Swaine, 1 Sid. 424. As where the plaintiff declared, that being indebted to the defendant *only in the sum of* 40*l.* that he for the purpose of holding him to excessive bail, and so keeping him in gaol, sued out a writ, and had *him held to bail for* 5000*l.* In consequence of which he was for several days detained in gaol. Plaintiff recovered for this special injury, and had judgment accordingly.

Skinner v. Gunton, & al. 1 Saund. 228. So where the plaintiff declared, "That the defendant not having *any cause of action*, had caused the plaintiff to be arrested for 300*l.* whereby he was detained in prison for a long time," *&c.* The plaintiff recovered for the injury.

Neal v. Spencer, Cas. K. B. 257. But in such case it has been held that the action will not lie for arresting the plaintiff without cause of action, if he be not held to excessive bail.

Salk. 14. Thurston v. Eunnes, March 47. 2. Where there is a good cause of action, as where a debt is really and *bona fide* due, *But a stranger without the privity of the person to whom the money is due, sues out a writ and arrests the debtor for it*, he may maintain an action for it, though he was then actually liable to be sued by the real creditor, the party who made the arrest, having no cause of action himself, nor authority from the real creditor.

*P. 272. * 3. "Where there is a good cause of action, but the "plaintiff sues in *a court which has not cognizance of the cause* "this action will lie. But in such case it seems that it should "appear that the plaintiff knew that the court had not cog- "nizance of the cause."

Goslin v. Wilcock, 3 Wilf. 302. As where the action was brought for arresting the plaintiff in this action by process out of the court of *Bridgewater*, when the cause of action did not arise within its jurisdiction, and plaintiff having recovered: on a motion for a new trial, the court was of opinion that the mere suing of a person in an inferior court not possessing jurisdiction, was not of itself sufficient foundation for this action, unless it appeared that that circumstance was known to the plaintiff and also some degree of malice appeared. As here the cause of action arising in *Taunton*, where plaintiff might have been sued, but defendant arrested him publicly at a fair at *Bridgewater*.

Atwood v. Monger, Style 378. So where the action was for causing a false presentment to be made against the plaintiff before the conservators of the river *Thames*, in a matter which did not appear to be within their jurisdiction, this action was held well to lie.

"So for suing a man in the Ecclesiastical Court for matters "not cognizable there this action lies."

Waterhouse v. Bawd, Cro. Jac. 133. But in such case the court must want *original jurisdiction* of the cause, for the action will not lie if the action is from its nature suable there, but happens to be barred by the de-

defendant's plea. As if it was for *tithes of wood*, which af- *P. 273.
erwards appeared to be *timber*, for which no tithe is due.

4. "Though the action be brought in the proper court, Hob. 260.
yet may this action be maintained, if the *ſuit or proceeding is utterly without ground* and *that known to the perſon himſelf*, for the undue vexation and damage to the plaintiff."

As where defendant had ſued out a ſecond *fieri facias* and Waterer v. Freeman. Hob. 260. 266.
ſold the plaintiff's goods, though he had taken before other goods under a former *fi. fa.* and in this caſe it was moved in arreſt of judgment, that this having been a civil proceeding that the action would not lie, but the court held, that the former *fi. fa.* being known to the defendant that this ſecond one was clearly malicious: but if he had not known of the firſt *fieri facias* that the action would not have lain.

5. So this action was held to lie for ſuing the plaintiff in Hocking v. Matthews, 1 Vent. 86. 1 Lev. 292.
the Spiritual Court and cauſing him to be excommunicated *falſe fraudulenter & malitioſe without giving him notice.*

6. "It is not neceſſary that the firſt action ſhould have been *heard* and decided in the defendant's favour, for this action equally lies *for any groundleſs proceedings whatſoever.*"

For where the plaintiff declared that the defendant in- Martin v. Lincoln, Mich. 27 *P. 274. Car. 2. C. B. Bull. N. P. 13.
tending to deprive him of his liberty without any probable grounds, ſued out a writ * of privilege out of *C. B.* and after an appearance put in by the plaintiff, that defendant knowing he had no probable cauſe, ſuffered himſelf to be *non-ſuited*, the action was adjudged well to lie.

7. "But when this action is brought on the ground of a former civil ſuit having been commenced againſt the plaintiff it is to be obſerved."

1. That this action muſt not be brought till the former Farrell v. Nunn, B. R. Trin. 5 Geo. 3. Bull. N. P. 13.
action has been determined, becauſe till then it cannot appear that the firſt action was unjuſt. 2. That there muſt not only be a thing done amiſs, but alſo a damage either already fallen upon the party or elſe inevitable.

2. "Such are the reſtrictions under which this action may be brought for *civil ſuits*. But it alſo lies for a malicious preferring of an *indictment, information or preſentment* againſt any one."

1. If a man is indicted for any crime that may *injure his* Savill v. Roberts, Salk. 13. 2 Raſ.
reputation or fame, he may have this action, for he is falſely ſcandalized by the malice of his proſecutor and this is a damage, for which the law gives an action. 2. If a man is indicted for any offence that ſubjects him to *peril of life or liberty and for which he may be puniſhed*, he may bring this action, for he is indangered in that reſpect and receives a damage. 3. If a man be falſely and maliciouſly indicted, though it neither touches his fame nor liberty, yet may he have

*P. 275. have this action *for the expence and * injury to his property* in defending himself on the indictment.

Upon these several cases it is to be observed.

Chambers v. Robinson, 1 Stra. 691. Jones v. Gwynne, Gilb. Rep. Trin. 11 Ann.

1. That this action will lie *though the indictment is bad, so that the party could not have been convicted on it*, (as where it was for perjury, and the perjury was so ill assigned, that an exception was taken to it by the judge and the party acquitted without examining any witnesses,) yet this action was held well to lie, the indictment serving all the purposes of malice by putting the party to expence and exposing him.

Payne v. Porter, Cro. Jac. 400. Salk. 14.

2. If the *indictment has been ignored* yet may this action be maintained, for by the preferring the indictment the party has been exposed, harassed and put to expence.

Smith v. Hickson, 2 Stra. 977.

3. "*Expence alone* will be sufficient to maintain this action." For where this action was brought for maliciously prosecuting the plaintiff and his wife for receiving stolen goods. And on *Not guilty* pleaded, the jury found for the defendant as to prosecuting the husband, and for the plaintiff as to the prosecution of the wife, and it was moved in arrest of judgment, that the husband should not have judgment on this, as the wife should be joined: but the court held that the expence alone which the husband had been at in her defence would support the action, though he himself was in no danger.

*P. 276. Bull. N. P. 14.

* 3. "But in general, in all cases in which this action is "brought, the plaintiff must shew *malice in the defendant* "*and want of a probable cause*, and *both must concur*."

Per cur. 4 Burr. 1974. Per Lord Mansfield in Johnstone v. Sutton, 1 Term Rep. 544.

But from the want of a probable cause, malice may be and most commonly is implied: but from the most express malice the want of a probable cause cannot be implied. For a man from a malicious motive may take up a prosecution, or he may from circumstances which he really believes, proceed upon apparent guilt, and in neither case is he liable to this action.

"In trials therefore in this action, if the plaintiff can "prove either from the circumstances of the case, as from "having a verdict, an acquittal, &c. that the action or "prosecution was groundless, and so that there was no pro- "bable cause, it shall be sufficient, unless the defendant can "shew satisfactorily to the court, that there was a probable "cause."

Reynolds v. Kenedy, 1 Wilf. 232.

As where the plaintiff brought this action against the defendant, for having seized sixty-one hogsheads of brandy on board his ship, which brandy was condemned by the sub-commissioners of excise, but which condemnation *was reversed by the commissioners of appeal.*—After a verdict for the plaintiff, judgment was arrested, for *the brandy having been condemned by the sub-commissioners of excise*, shewed that there was some probable cause for the seizure, so that one ground of this action failed, *viz.* the want of a probable cause, and defendant had judgment.

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So where the action was for putting the defendant into an arreſt on board his own ſhip, for diſobedience of orders, of which he was afterwards acquitted by ſentence of a court martial, and plaintiff had a verdict; it being for a matter properly cognizable by a court martial, and for which ſome probable cauſe appeared, the judgment was arreſted. *P. 277. Johnſtone v. Sutton, in error, Term Rep. 493.

"And what ſhall be deemed a probable cauſe is matter upon which the *court* ſhall decide, not *the jury*."

As in the two caſes laſt mentioned.

So where the plaintiff having brought an action againſt the defendant, for a malicious proſecution for perjury, obtained a verdict: upon a motion for a new trial, the court ſet the former verdict aſide, it appearing from the notes of the judge, that there was probable cauſe, not as being a verdict againſt *evidence*, but againſt *law*. Golding v. Crowle, Mich. 25 G. 2, Bull. N. P. 14.

And note, that where a juſtice of peace without any regular information before him, grants a warrant to apprehend a perſon on a ſuppoſed charge of felony, and commits him to priſon on ſuch charge, this action will not lie: for the immediate act, the arreſt and impriſonment is the offence, and therefore the action ſhould be treſpaſs, *vi & armis*. Morgan v. Hughes, Hil. 28 G. 3. 2 Term Rep. 225.

2d. OF AN ACTION ON THE CASE IN THE NATURE OF A CONSPIRACY. *P. 278.

An action on the caſe in the nature of a conſpiracy, lies where two or more combine for the purpoſe of preferring indictments, charging crimes againſt any one without foundation, or otherwiſe conſpiring to prejudice a man wrongfully, either in perſon, fame or property. Finch's Law 305.

1. There are four incidents to a conſpiracy. 1. It ought to be diſcloſed by ſome manner of proſecution, or by making of bonds or promiſes to one another. 2. It ought to be malicious for unjuſt revenge. 3. It ought to be falſe againſt the innocent. 4. It ought to be out of court voluntarily. The Poulterers caſe. 9 Co. 55. b.

2. "But there is a diſtinction between an action of conſpiracy, properly ſo called, and an indictment for a conſpiracy."

1. "An action of conſpiracy, properly ſo called, lies not unleſs the party has been indicted *& legitimo modo acquietatus*, for ſo are the words of the writ, but it ſeems that an indictment for a conſpiracy will lie, where there has been a falſe conſpiracy among many, though nothing has been put in execution." 9 Co. 56. b.

"So there is a difference between an action of conſpiracy and an action on the caſe in the nature of a conſpiracy."

For if an action of conſpiracy is againſt two or more, if but one are acquitted, judgment ſhall not go againſt him: Subley v. Mott, 2 Wilſ. 210.

*P. 279. *him: but where the action is on case, in the nature of a conspiracy against two or more, then one only may be found guilty.

3. "And this being in fact an action for malicious prose-
"cution, with this difference, that an action for a malicious
"prosecution may be brought against one only, but an ac-
"tion on the case in the nature of a conspiracy, must be
"against more than one, or against one charging, that he
"together with *J. S.* or others had conspired to indict the
"plaintiff, or charge him with a crime, the grounds of the
"action therefore are the same."

Mills v. Mills, Cro. Car. 173.

As where an action on the case in the nature of a conspi-
racy, was brought against the defendants, for causing the
plaintiff to be arrested, and held to bail, where there was
no cause of action, the plaintiff recovered.

Skinner v. Gunter & al. Vent. 12.

So though the bill of indictment has *been ignored* yet the
action will lie for the conspiracy, as before in the case of
malicious prosecution.

Hord v. Cordery, Hutt. 49.

3d. OF THE PLEADINGS AND EVIDENCE.

And first on the Part of the PLAINTIFF.

1. As this action is founded on the injury "received from
"a groundless or malicious suit or prosecution it must
*P. 280. "therefore appear to the court to have been groundless.
"The declaration therefore should always state * that the
"suit or prosecution had been decided in favour of the
"plaintiff, for from the acquittal or discharge, the pre-
"sumption is in favour of the plaintiff's innocence, and
"till acquittal, it cannot appear that the first was unjust."

Farrel v. Nunn, Pasch. 1712. Bull. N. P. 14.

As where this action was brought for a malicious presen-
ment of the plaintiff for incest, in the Ecclesiastical Court
of *Huntingdon*: on demurrer to the declaration, it was held
to be bad, it not being stated, that the prosecution was dis-
posed of and at an end, and not still depending, for so a
man might be found guilty in this action, and yet succeed
in the first prosecution.

Fisher v. Bristow, Dougl. 205.

So where the action was for maliciously preferring an in-
dictment against the plaintiff, on demurrer to the indictment
for cause that it was not stated how the indictment was dis-
posed of, defendant had judgment.

Lewis v. Farrell, 1 Stra. 114.

And it is not sufficient to say "That the plaintiff was
discharged from his imprisonment." It should state the pro-
secution to be at an end: for a man may be discharged tho'
not acquitted.

Morgan v. Hughes, Hil. 28 G. 3. 2 Term Rep. 225.

But the defendant should take advantage of the not set-
ting out the decision of the case in the declaration by plea
for it will be cured by a verdict.

Skinner v. Gunter, 1 Saund. 228.

2. If this action is brought for maliciously holding the
defendant to bail, the declaration should state, "That the
plaintiff

Robins v. Robins, Salk. 15.

Plaintiff being *indebted to the defendant *in ſuch a ſum*, that defendant had ſued out a writ for ſo much *more* on purpoſe to hold him to bail in that action;" it is not ſufficient to ſay, "That defendant cauſed him to be arreſted, and though he offered a common appearance, yet that he held him to bail where no bail by law was required," for otherwiſe the extent of the injury does not appear. *P. 281.

3. "Where the declaration ſets out the proceedings to have been in a court that had authority of the ſubject matter, it need not exactly copy the *ſtyle of the court* as ſet out in the record; though if a court of a different authority had been deſcribed, it would be bad." Barns v. Conſtantine, Cro. Jac. 32.

Therefore where the declaration in this action ſtated, "That at a *general quarter ſeſſions of the peace* for *Middleſex*, the defendant had indicted the plaintiff, of which he was afterwards acquitted, &c." On producing the record in court it appeared that the indictment was found at the *general ſeſſions* only, the plaintiff at the trial was non-ſuited for the variance; but the court ſet the non-ſuit aſide, the ſeſſions appearing to be the ſame. Buſhy v. Watſon, 2 Black. Rep. 1050.

But where the malicious proſecution complained of, has been by indictment, the declaration ſhould correſpond ſubſtantially with the indictment, and therefore where the indictment had been for ſtealing *unum ſiniticulum* and the declaration laid it for ſtealing *unum ſiniticulum*, the variance was held to be fatal. Anon. Caſ. K. B. 555.

*2. OF THE PLEADINGS *on the part of the* DEFENDANT. *P. 282.

1. "As to ſupport this action there muſt both appear to be malice and want of a probable cauſe, though expreſs malice be proved, yet if defendant can prove a probable cauſe, he ſhall have a verdict." Bull. N. P. 14.

Therefore defendant's plea ſhould ſhew what cauſes and grounds of ſuſpicion he had to proſecute the plaintiff: as if it was for indicting the plaintiff for felony, he ſhould ſhew his grounds for ſuſpecting him, as that he was found on the poor, &c. Knight v. Jermyn, Cro. Eliz. 134.

So he ſhould ſhew that a felony was committed, and that there was nobody by at the time of the ſuppoſed felony, but the defendant and his wife, their oath at the trial of the indictment may be given in evidence to prove the felony. Johnſon & ux v. Browning. 6 Mod. 216.

2. So in caſe in the nature of conſpiracy, the plea ſhould ſet out the caſe as it was, and the circumſtances inducing the defendants to prefer their bill or indictment againſt the plaintiff. Pain v. Rocheſter & al. Cro. Eliz. 871.

And where defendant ſo ſets out the ſpecial matter, he need not traverſe the *falſe & malitioſe* laid in the declaration, ſince he ſtates the facts which the plaintiff might have traverſed. Chambers v. Taylor, Cro. Eliz. 900.

*P. 283. *1. OF THE EVIDENCE.

1. On the part of the PLAINTIFF.

Morrison v. Kelly, 1 Black. Rep. 385.

1. If this action is for maliciously indicting the plaintiff *for a felony*, on which defendant has been acquitted, there must be copy of the record and acquittal from the court where the trial was had and which must be granted by that court, produced in evidence. But where the indictment is only *for a misdemeanor*, as for keeping a disorderly house such copy is not necessary. Here the clerk of the sessions attended with the record of the acquittal for the misdemeanor at the sessions, and it was held to be good evidence.

Carth. 421. 3 Black. Com. 126.

As therefore the court where the acquittal was, must grant a copy of the record and acquittal, in order that the plaintiff may maintain his action, and it is discretionary in them to grant or withhold it, it is therefore usual to deny a copy of the indictment where there has been any, the least probable ground to found such a prosecution on.

Jordan v. Lewis, 2 Stra. 1122.

But where the plaintiff and another were indicted for forgery at the *Old Bailey*, and acquitted, and a copy of the indictment and acquittal granted to the *other only*; in this action which was for the malicious prosecution, the plaintiff offered the copy of the indictment so granted in evidence and the order at the *Old Bailey* was read by way of objection but the chief justice admitted it, saying that an *order was not necessary to make it evidence, nor is it ever produced in order to introduce it. So it was read and the plaintiff obtained a verdict which the court refused to set aside.

*P. 284.

Clayton v. Neilson, Pasch. 1712. Middlesex, Per Parker, Ch. J. Bull. N. P. 13.

2. Plaintiff may give in evidence, the substance of the charges given on the indictment, and the circumstances which shew that the prosecution was malicious and without probable cause: and he may likewise give in evidence the circumstances of the defendant in order to increase the damages.

Chambers v. Robinson, Stra. 691.

As in this case, in evidence of malice, the plaintiff was allowed to give in evidence, advertisements put into the papers by the defendant, mentioning, that the indictment had been found against the plaintiff, and other scandalous matters, though an information had been granted for them as libels.

Johnson & ux. v. Browning, Mod. Cas. 212.

3. The defendant's name on the back of the bill is a sufficient and the best evidence of his having been sworn to the bill: so it may be proved that he was a witness without having the bill.

Girlington v. Pitfield, 1 Vent. 47.

But a person's name being indorsed is no evidence that he was prosecutor, for in this case it was the name of the justice and others, who were to give evidence.

Goddard v. Smith, Salk. 21. Mod. Cas. 261.

4. If plaintiff declares for a malicious indictment of which he was *lawfully acquitted*, if on the trial it appears that he got off by a *noli prosequi*, the evidence will not maintain

the declaration, for a *noli prosequi*, is only a discharge to the indictment, but no acquittal of the crime. But if the party had pleaded Not guilty, and the attorney general had confessed it, that would support the declaration. *P. 285.

5. In this case, which was that of the *Cock Lane* ghost, the court held that there was no need of proving the actual fact of the defendants *meeting* and conspiring together, that that might be collected from collateral circumstances. It was on an *information*; *ideo quære* if there is any difference in the case of an action. Rex. v. Parsons & al. 1 Black. Rep. 392. 1 Black

2. *Of the Evidence on the Part of the* DEFENDANT.

Though an action will lie for a malicious prosecution, yet it is not to be favoured: therefore if the *indictment has been found by the grand jury*, the defendant shall not be obliged to shew a probable cause, but it shall lie on the plaintiff to prove express malice. However, if he can, the defendant should give evidence of a probable cause, and for this purpose, proof of the evidence given on the indictment is good. And where the fact lies in the knowledge of the defendant himself, he must shew a probable cause, though the indictment be found by the grand jury, or the plaintiff shall recover without proving express malice. Savill v. Roberts, Salk. 15. Cobb v. Carr, Middlesex, Mich. 1746. Parrot v. Fishwick. London after Trin. 1772. Bull. N. P. 14.

*4. *Of the Damages.* *P. 286.

1. The foundation of this action being malice, and the want of a probable cause, the court refused to grant a new trial for excessive damages, though no injury had happened to the plaintiff's trade or reputation, and the sum expended in his defence was much less than the damages given, for the court held that the *malice* should enter into the consideration of them. Farmer v. Darling. 4 Burr. 1972.

2. How far the jury may sever in the damages it has been decided; that where this action was brought against the prosecutor of the indictment and the justice who had committed the plaintiff, and the jury gave 200*l.* damages against the prosecutor, and 20*l.* against the justice, Ch. Just. *King* took the verdict so. But in this case against several defendants the jury gave 800*l.* damages against one, and 300*l.* each against three others. Lord *Raymond* said, it should not be done, and a verdict was given for 1100*l.* against them all together, *ideo quære*. Lane v. Santeloe, 1 Stra. 79. Lowfield v. Bancroft, 2 Stra. 910.

CHAP.

*P. 287. *CHAPTER XII.

THE ACTION OF TROVER.

TROVER is an action which lies where one man gets poſſeſſion of the goods of another by delivery finding or otherwiſe, and refuſes to deliver them to the owner, or ſells, or converts them to his own uſe, without the conſent of the owner, for which the owner by this action recovers the value of his goods.

In this action the defendant is ſuppoſed to have come legally into poſſeſſion of the goods, and the wrong done, or the giſt of the action, is the illegal converſion of them to his own uſe, without which the action cannot be maintained.

I ſhall in this action conſider. 1ſt, The nature of it with reference to the things for which it lies. 2dly, With reference to the perſon. 3dly, The pleadings and evidence. 4thly, The damages and coſts.

1. OF TROVER WITH REFERENCE TO THE THINGS FOR WHICH IT LIES.

1. In this action the validity of *ſales* may be tried.

*P. 288. *1. *Of Sales by the Intervention of a Factor or Agent.*

" If goods are *not delivered* to a factor or agent, but he " is only *impowered to ſell* by the principal, this ſhall not " preclude the principal himſelf from ſelling them."

Alwyn v. Taylor, Aleyn 93.

For where defendant being owner of a great quantity of malt, then being on board a veſſel, impowered one *Smith* a broker to ſell *it*; before *Smith* ſold it, defendant himſelf had ſold it, but *Smith* had no notice; afterwards *Smith* ſold it to the plaintiff, who brought trover for it againſt the defendant. It was at firſt doubtful whether *Smith* the broker would not be liable to the plaintiff, as he could not perform his bargain, though it was without his default, ſo that his ſale ought for that reaſon to be held valid. But afterwards *Rolle*, Ch. J. held that the owner's ſale ſhould prevail against that of his factor, who had but a bare authority, and that the broker's ſale ſhould have been conditional, if the owner had not ſold before, but he ſaid that neither the broker nor his vendees ſhould be liable to any action for detaining the goods, if they had no notice of the ſale by the owner.

2. *Of Sales by the Sheriff.*

Ayre v. Aden, Cro. Jac. 73. Yelv. 44. S. C.

As where the ſheriff having taken goods in execution was diſcharged of his office before a ſale or the writ return

ed, but he afterwards * ſold the goods without a *venditioni exponas*; upon trover being brought for them, it was reſolved, that the *fieri facias* gave him an authority to ſell without any other writ, though he was out of office. *P. 289.

3. *As to the Sales of Stolen Goods.*

By ſtat. 21 *H.* 8. *c.* 11. "Goods ſtolen ſhall be reſtored to "the owner, upon his giving or procuring evidence againſt "the felon, ſo that he be proſecuted to conviction."

Wherever therefore the felon is convicted, the owner may maintain trover for the goods ſtolen, into whoſe hands ſoever they have come; and at common law they were not bound even by a ſale in market overt. 2 Inſt. 714.

But if ſtolen goods are ſold in market overt, the owner cannot maintain trover for them till after the conviction, for it depends on that whether he will be entitled or not, as till then he has *no property*, which is neceſſary to maintain this action; and if the perſon who had ſo bought them in market overt, ſells them in the interval before conviction of the felon, he ſhall not be liable to an action of trover, for he ſhall not be obliged to keep the goods which may be of a periſhable nature: and that ſhall be ſo, though *he received notice* from the owner of the goods of their being ſtolen. But *per* Lord *Kenyon* the plaintiff having a right to reſtitution of his goods, would perhaps be entitled * to recover damages in trover againſt any perſon who is fixed with the goods after conviction, and refuſes to deliver them up, for then the goods are converted to the prejudice of the owner. Horwood v. Smith. Mich. 29 G. 3. 2 Term Rep. 750. *P. 290.

4. *As to Sales void by Statute* 13 *Eliz. c.* 5.

By this ſtatute it is enacted, "That all feoffments, gifts, "alienations and conveyances of lands or goods made to "the intent to defraud creditors, ſhall be null and void."

Under this act it has been decided,

1. That where one *Pierce* being indebted to *Twyne* in 400*l.* and to *C* in 200*l.* and *C.* having brought an action of debt againſt *Pierce*, pending the writ, he made a general deed of gift of all his goods and chattels to *Twyne* in ſatisfaction of his debt, but notwithſtanding, *Pierce* ſtill continued in poſſeſſion of his goods, ſome of them he ſold, he ſhore the ſheep, and marked them with his own mark, and exerted every act of ownerſhip. This tranſaction appearing, it was clearly held, that the conveyance to *Twyne* was fraudulent and void within the ſtat. 13 *Eliz.* For it was made with a truſt between the parties, and the owner continuing in poſſeſſion, it gave him a credit whereby he traded with others, and ſo was enabled to cheat and defraud them. Twyne's caſe. 3 Co. 80. b. Stone v. Grubham, 2 Bulſt. 218.

2. "Wherever therefore a perſon makes a bill of ſale of "his effects, or any other ſimilar * conveyance, *unleſs poſ-* "*ſeſſion follows and accompanies the deed*, it ſhall be deemed "fraudulent, and the goods may be recovered in trover." Per Buller Juſt. 2 Term Rep. 595. *P. 291.

Bamford v. Baron, quot 2 Term Rep. 594.

As where in trover by the ſheriff for goods which had been taken by the defendants, after they had been taken in execution by him at the ſuit of a creditor, in *April* 1787. The defendants ſet up an aſſignment of the goods by *Hayes* (who was the owner) to two perſons for the benefit of ſuch of his creditors as would ſign a compoſition deed by a certain time, which aſſignment was dated 16 *Auguſt* 1786. The plaintiff replied, that in that aſſignment it had been agreed that *Hayes ſhould continue in poſſeſſion till May* 1787, and that he did ſo continue in poſſeſſion; upon which the court were clearly of opinion that the aſſignment was fraudulent and void within the ſtat. 13 *Eliz.* though it appeared that during that time *Hayes* was *to account with the two truſtees* for the profits of his buſineſs; and the plaintiff recovered accordingly.

Edwards v. Harben, Trin. 28 Geo. 3. 2 Term Rep. 587.

So where a perſon being indebted both to the plaintiff and defendant, made a bill of ſale of all his effects to the defendant, in which was a clauſe that defendant ſhould be at liberty within fourteen days from the execution of the bill of ſale, to enter upon and ſell the effects ſo aſſigned, in caſe the money was not ſooner paid; before the end of the fourteen days, the perſon died, upon which the defendant entered upon the goods and ſold them, when it was held *P. 292. that the owner having been left and dying * in poſſeſſion of the goods, that the aſſignment was fraudulent, and that defendant having ſo interfered ſhould be liable to the whole of the plaintiff's debt as executor *de ſon tort*.

Per Buller, Juſt. in S.C.

3. "But the caſes here are where the conveyance is *abſolute*, for caſes may occur in which the owner may continue in poſſeſſion, and yet the conveyance not be fraudulent. As if the conveyance is *conditional*, there the vendor's continuing in poſſeſſion does not invalidate the ſale, *becauſe by the terms of the conveyance* the vendee is not to have poſſeſſion till he has performed the condition."

Ibid.

"So where the want of immediate poſſeſſion is conſiſtent with the deed."

Cadogan v. Kennett, Cowp. 432. Vid. et Foley v. Burnell, quot. Cowp. 435. S. P.

As where on the marriage of Lord *Montfort*, *the houſhold goods* of his houſe in town, were *inter alia*, conveyed to truſtees, in ſtrict ſettlement. Lady *Montfort*'s fortune was 10,000*l.* equal to pay all his debts at the time of his marriage, and the goods were added to the ſettlement, Lord *Montfort's* real eſtate not being deemed ſufficient to make an adequate ſettlement. Defendant was a creditor before Lord *Montfort*'s marriage, and had taken the goods under an execution: on trover brought for the goods by the truſtees, it was held clearly, that the ſtatute 13 *Eliz.* was only intended to operate againſt *fraudulent* conveyances, and that poſſeſſion *alone* was not evidence of fraud, that this therefore being a fair and proper ſettlement, could not be deemed void under the ſtatute,

* ſtatute, particularly as Lady *Montfort*'s fortune was equal to pay all the debts, and the houſhold goods were included in the ſettlement for a ſufficient reaſon. *P. 293.

So where perſonal property, and among other things, ſome cows were ſettled on the marriage of the plaintiff's wife on certain truſts, they were held not to be liable to the huſband's debts. Haſlington v. Gill, 2 Term Rep. 597.

4. " Another's caſe of ſales not void under the ſtatute " though no poſſeſſion has been delivered, is that of the " ſale or aſſignment of *ſhips at ſea*."

For if a ſhip be ſold while at ſea, a delivery of the grand bill of ſale amounts to a delivery of the ſhip itſelf, for it is the only delivery of which the ſubject matter is capable, and beſides it does not give any degree of falſe credit to the vendee or aſſignee. *Vide poſt plenius.* Atkinſon v. Malling. Paſch. 28 Geo. 3. 2 Term Rep. 462.

2. " Inſtruments conveying a *choſe in action*, may be reco- " vered by *trover*."

As where this action was brought for *letters patent of wine licence*; after a verdict for plaintiff it was moved in arreſt of judgment, that a record cannot be convereted: *ſed non allocatur*, for the words *letters patent* here ſignifies the exemplification of them under the broad ſeal, and ſo is intended in *common parlance*, for which this action lies. Jones v. Wickworth, Hard. 111.

* So trover was in this caſe held to lie for a *bill of exchange*. *P. 294.

† So for *million lottery tickets*. Lucus v. Haynes, Salk. 130.

‡ So for a *bond*. † Ford v. Hopkins, Salk. 283.

3. " Trover will not lie for goods which have been " condemned by a court having competent juriſdiction." ‡ Arnold v. Jefferſon, Salk. 654.

§ As where the plaintiff brought an action of trover for a ſhip, tackle and furniture, which ſhip had been condemned by the admiralty of *France*, as prize, and bought by the plaintiff when ſold under the ſentence, but had been taken out of his poſſeſſion by the defendants claiming property on the ground of the capture being illegal. It was reſolved, that the courts here were bound to give credit to the ſentence of foreign courts, and that their condemnations were not examinable at common law, and therefore the plaintiff had judgment. § Hughes v. Cornelius, Sir T. Raym. 473.

" But where the juriſdiction of the court is in any reſpect " limited, there trover will lie for goods which have been " ſeized or condemned by ſuch courts, for the purpoſe of " trying if ſuch courts have exceeded their juriſdiction."

As in the caſe of condemnations by the commiſſioners of exciſe, who though under the ſtatutes of exciſe, they are inveſted with the right of condemning exciſeable goods, &c. yet may the owner nevertheleſs maintain an action of trover for them, if he ſuppoſes them illegally condemned. Papillon v. Buckner. Hard. 478. Terry v. Huntington, Hard. 480. S. P.

*P. 295. * 4. "Another case in which trover lies is to try the "property arising under *consignments of merchandize.*"

This is first to a creditor. 2d. To a factor. 3d. To any other person.

And First, *Of Consignments to a Creditor.*

Hibbert v. Carter. Pasch. 27 Geo. 3. Term Rep. 745.

1. The indorsement of the bill of lading *to a creditor*, conveys an absolute property to the indorsee, and he may maintain trover for the goods included in such bills of lading.

† Caldwell v. Ball, Pasch. 26 Geo. 3. Term Rep. 205.

† And where there are several bills of lading, of different imports, which are differently indorsed, the person who first gets one of them by legal title from the owner or shipper has a right to the consignment in exclusion of the others.

2. *Of Consignments to a Factor.*

§ Per Lord Mansfield, in Wright v. Campbell, 4 Burr. 2046.

§ If there is an authority ever so general, by indorsement of the bill of lading, without disclosing that the indorsee is factor, the owner (as between him and the factor,) retains a lien till the delivery of the goods, and until they are actually sold and turned into money.

Ibid.

But if the goods are *bonâ fide* sold by the factor while at sea, such sale shall be good and shall bind the owner, because the goods were *bona fide* sold, and by the owner's own authority.

S. C. *P. 296.

And if a factor to whom a bill of lading is indorsed *generally*, but in fact to him *as factor*, * though that is not expressed, indorses it over as his own property; such indorsement shall be good, if for a fair and valuable consideration and without notice; *aliter* if only a spurious one to defraud the owner.

3. *Of Consignments to other Persons.*

Lickbarrow v. Mason, Mich. 28 Geo. 3. 2 Term Rep. 63.

1. After goods have been consigned, the consignor if he think fit, *may stop the goods before they come to the hands of the consignee*, as if the consignee becomes insolvent or a bankrupt. (*Snee* v. *Prescott*, 1 *Atk.* 245.)

‡ S. C.

‡ 2. But where the bill of lading reaches consignee before the goods, and *he makes a fair and* bonâ fide *assignment of the bill of lading to a third person for a valuable consideration*, there the consignor cannot stop the goods, but an absolute property is conferred by the assignment.

Salomons v. Nissen, Mich. 29 Geo. 2. 2 Term Rep. 674.

But if the consignee to whom the bill of lading is indorsed does *not part with his whole interest in* the goods, but only assigns it to another as a collateral security to him and so *remains interested, or as a partner* in the goods, notwithstanding the assignment, there the property of the consignor is not divested, but he may stop the goods before they reach the hands of the consignee or of the person to whom he indorsed the bill of lading.

5. "Another case in which this action is usual, is to try "the validity of *commissioners of bankrupt*, or to recover "*goods belonging to the bankrupt estate.*"

*In all actions brought in which the bankruptcy comes in queſtion, it is neceſſary to go through all the ſteps before entered into by the commiſſioners, that is to prove, firſt, that the party was a trader. 2dly, The act of bankruptcy. 3dly, The petitioning creditor's debt. 4th, The iſſuing of the commiſſion. 5th, The aſſignment. 6th, A property in the bankrupt. I ſhall therefore conſider each of theſe in their order. *P. 297.

1. *The Party muſt be a Trader.*

Who are to be deemed *traders* within the bankrupt laws depends either on expreſs ſtatute, or on the deciſion of the courts on the meaning of that term, (trader) as conſiſtent with the ſpirit of the ſtatutes.

1. The general deſcription of perſons ſubject to the bankrupt laws, is under ſtatute 13 *Eliz. c.* 7. *viz.* "Perſons uſing "the trade of merchandize by buying or ſelling by way of "bargaining, exchange, re-change, barter or cheviſance "by groſs or retail, or who ſeek their living by buying or "ſelling."

2. By ſtatute 21 *Jac.* 1. *c.* 19. "Perſons uſing the trade "of a *ſcrivener*, receiving other mens money into their "truſt or cuſtody, may be bankrupts."

3. By ſtatute 5 *G.* 2. *c.* 30. "bankers, brokers and fac-"tors, are declared to be liable to the bankrupt laws."

*4. "Perſons having ſtock in ſeveral public companies, *P. 298.
"are by ſeveral ſtatutes declared not be objects of the "bankrupt laws. As having *Eaſt-India* ſtock, (by ſtatute 14 "*Car.* 2. *c.* 24) *Bank* ſtock; ſhares in the *Engliſh* linen "company; royal fiſhing company; *Guinea* company; "*London* Aſſurance company; *South ſea* company; Plate-"glaſs company; or being concerned in the circulation of "*Exchequer* bills; by the ſeveral ſtatutes of 7 & 8 *W.* 3. *c.* "31. 8 & 9 *W.* 3. *c.* 2. § 47. 5 *Ann. c.* 13. 7 *Ann. c.* 7. 3 *Geo.* "1. *c.* 8. & 4 *Geo.* 3. *c.* 37. § 14."

5. By ſtatute 5 *Geo.* 2. *c.* 30. § 40. "No farmer, grazier, "drover, or receiver general of the land-tax, ſhall be liable "to be made a bankrupt."

Under theſe ſtatutes, it has been held.

1. The general words of the ſtatute 13 *Eliz.* being, "*who ſeek their living by buying or ſelling*," a man who lives by buying only or by ſelling only cannot be a bankrupt: And ſo for the ſame reaſon it being for the purpoſe of *ſeeking a living*, one ſingle act of buying and ſelling will not make a man a bankrupt, for it muſt be a repeated practice and profit ſought by it. And on the ſame principle, no handicraft occupation (where nothing is bought or ſold, and ſo an extenſive credit for the ſtock in trade, is not neceſſary to be had) will make a man a regular bankrupt, as a gardener, gold-beater, *&c.* who are paid merely for their work and labour. Per Lord Mansfield, Cowp. 750. Com. Dig. 522. 2 Black. Comm. 476. Ibid. Crump v. Barne, Cro. Car.

But 21.

*P. 299. 2 Black. Comm. 476. Luton v. Bigg. Skin. 292.

*But where persons buy goods and make them up into saleable commodities, though part of the gain is by bodily labour and not by buying or selling, yet these are within the statutes of bankrupts, for the labour is only in melioration of the commodity, and rendering it more fit for use. Therefore according to the doctrine before delivered, a *mere working taylor* cannot be a bankrupt; but a merchant taylor who buys cloth and makes it up for his customers may be a bankrupt, and so of other trades, as bakers, brewers, clothiers, &c.

3 Mod. 330. Dally v. Smith, 4 Burr. 2048.

So the court of *B. R.* held that a *butcher* might be a bankrupt.

2. "Neither is it necessary that *the trade be lawful* in order to make the trader a bankrupt"

Ex parte Meymor, 1 Atk. 196.

As where a commission of bankrupt issued against a *clergyman*, and he petitioned to have the commission superseded on the ground, that by statute 21 *Hen.* 8. *c* 13. "All spiritual and ecclesiastical persons are forbidden to follow "any trade or buy or sell for gain under a penalty." But Lord *Hardwicke* was of opinion, that this penalty only attached against himself, and that he was liable to the bankrupt laws, the trading being proved.

Ibid.

So in the same case he held, that a person who dealt merely in *smuggling and running of goods*, though this was an offence and contrary to an act of parliament; yet still that it was a

*P. 300.

trading within the statutes, for that in both * cases a person should not take advantage of the breach of one law to excuse him from the breach of another.

Highmore v. Molloy, 1 Atk. 206.

3. The statute 5 *Geo.* 2. having declared that *brokers* might be bankrupts, Lord *Hardwicke* was of opinion, that *pawnbrokers* were included and might be bankrupts, for though they are not expressly named, yet the word *broker* is the genus, and all other kinds of brokerage the species.

4. "Though the statutes mention persons only *using trade*, "&c. as objects of the bankrupt laws, yet if *persons in other* "*professions or employments* however seemingly inconsistent, "will do any acts of trading with *a view to profit*, they shall "be subject to the bankrupt laws."

1 Stra. 514.

As a *gentleman of the bar* who had a colliery and dealt in coals in *Durham*, was held to be a trader within the bankrupt laws.

Per Lord Hardwicke, 1 Atk. 206.

So though a man be a *public officer*, as an *excise-man* or such like, yet if he will trade, he makes himself subject to the statutes of bankrupts.

1 Atk. 101.

So a commission of bankrupt formerly issued against a *peer*, an earl of *Suffolk*, for trading in wines.

5. "*Drawing and re-drawing bills of exchange*, is an act "of trading that will subject the party to a commission of "bankrupt: but such should * not be on a *person's own and*

*P. 301. "*sole account*, but *with the money of others* to make a profit."

For

For in this case which was an issue out of Chancery, to try if one *Wilson* was a trader within the bankrupt laws; it appeared that he was an army agent, and that he was for many years in the habit of drawing bills of exchange on a captain *Johnson* of *Dublin*, who was likewise an army agent, to a large amount; and *Johnson* re-drew upon him. But it appeared further, that *he also received money from officers, their widows and others*, which he kept for them, and for which they drew on him, but that when he had a large sum he did not keep it in the house, but paid it into *Drummond's* bank, on which he gave checks for any large payments he had to make: In this case the jury found him to be a trader, and the judgment was given accordingly, on the ground of the profit he derived from the exchange and the use of the money of others. Richardson v. Bradshaw. 1 Atk. 128. quot. Cowp. 750.

But where a person engaged in expensive works drew bills on different persons, for the purpose of raising money for those works, but allowed to the persons who accepted his bills a quarter *per cent.* commission besides interest at 5 *per cent.* and also borrowed accommodation notes in exchange for his own, he was held not to be within the bankrupt laws, for all the transactions of the bills was on *his own account and for his own benefit*. Hankey v. Jones, Cowp. 745.

6th. "The words of the statutes of bankrupt being, "using the trade of a merchant by * buying and selling," the act of buying and selling must be *in the way of* "*a merchant.*" *P. 302.

Therefore an *innkeeper* as such cannot be a bankrupt, for his living is not principally got by buying and selling, but by *the use of his rooms and furniture*; and he buys meat and drink, not for sale or trading, but for accommodation: neither does he *buy or sell at large* as a merchant, but to guests only: "For wherever a man sells or buys *under a par-* "*ticular* restraint or limitation, he is not a seller within the "statute—for the statute is selling in the *way of merchants*; "that is *indiscriminately and generally to all.*" Crisp. v. Pratt, Cro. Car. 549. Newton v. Trigg, Salk. 110. Per Holt, Salk. 110.

On the same ground that an innkeeper has been held not to be an object of the bankrupt laws, a *victualler* who sells liquors only *in his own house*, or *out of it in small quantities*, as by the pot or mug, is not a trader within the bankrupt laws. Saunderson v. Rowles, 4 Burr. 2065.

"But in this case, it must be taken that the selling out of "the house was rather to oblige customers, than as *a means* "*of living*, for though a person follows the trade of a vic- "tualler, yet if he also deals in liquors which he sells indis- "criminately, whatever the quantity, he may be a bank- "rupt."

For where a person kept a public house or inn, and during the time he was in business, which was about nine months, sold about six gallons of spirits all together, but it appeared that *any person* applying for liquors might have been supplied, Patman v. Vaughan, Hil. 27 Geo. 3. Term Rep. Judge 572.

*P. 303. * Judge *Buller* left it to the jury to decide whether this was not a trading, and they found the party a bankrupt. And in this case, the same Justice ruled, that the *quantity sold* was immaterial to the question, for if he had dealt largely he would not probably be a bankrupt.

"But however it may perhaps be proper to take into consideration *the proportion* which the business of selling liquors out of doors, bears to the business as an innkeeper or victualler, that so it may appear to be done with a view to seeking a living."

Buscall v. Hogg. 3 Wilf. 146. For where in this case the person was an innkeeper, but was proved to have sold often large quantities of wine, rum and brandy to different persons, which many after retailed again, the judge nonsuited the plaintiffs who were the assignees, holding such person not to be an object of the bankrupt laws, but the Court set aside the nonsuit, holding that doctrine now laid down, that at the trial the proportion of his dealings out of doors and as an innkeeper should be taken into consideration.

7. "The stat. 5 *Geo.* 2. having declared farmers, graziers and drovers to be not objects of the bankrupt laws; on this part of the statute it has been decided."

Milles v. Hughes, Mich. 19 Geo. 2. C.B. Bull. N. P. 39. 1. If a person buys cattle at a fair, keeps them three or four days on his land, and then drives them to another fair to sell them, he is a *drover* within the statute.

*2. "But though a farmer merely as such is not an object of the bankrupt laws, yet if he buys any great quantities
*P. 304. "of things, such as are the produce of his farm and sells them, he shall be liable to a commission of bankrupt."

Mayo v. Archer, 1 Stra. 513. As where a special verdict found that one *Richard Baxter* had occupied a farm of 300*l.* a year, and annually planted it with many acres of potatoes, which he sold for gain, and likewise bought from others large quantities of potatoes which he kept in warehouses, and sold again at different markets. His dealing so extensively and in such manner was held to make him a trader within the meaning of the bankrupt laws.

Bartholomew v. Sherwood, Mich. 27 G. 3. quot. 1. Term. Rep. 573. So where plaintiff was assignee of one *Davis* who, it appeared, rented a considerable farm at *Whitchurch*, and kept two or three teams of horses, that previous to his taking the farm, he had lived with an uncle, during which time he attended fairs, and bought and sold several horses, that after he took the farm, he occasionally attended fairs and bought horses which were not calculated for the farming business, and which he always sold again for some profit. On this evidence the Judge left it to the jury to decide whether the dealing in horses was not distinct from the farming business, and done with a view to profit, and the jury found *Davis* a bankrupt, which verdict on a motion for a new trial was afterwards confirmed by the Court.

*"In these cases, the person carried on a business indepen- *P. 305.
"dent of the merely using the land, for where the whole
"trading arises from the land itself or its profits the person
"cannot be a bankrupt."

As where the person against whom the commission was sued out was proved to have *purchased a coal mine, worked it, and sold the coals*, he was held not to be a trader within the statutes of bankrupt. Port v. Turton. 2 Wilf. 169.

So where a person purchased *allum works*, the same decision took place. Newton v. Newton, quot. 2 Wilf. 170.

"For where a person exercises a manufacture from the
"produce of his own land, *as a necessary and usual mode of*
"*enjoying the produce of that land*, he shall not be considered
"as a trader within the bankrupt laws, though he buys the
"necessary ingredients to fit it for market. But where the
"produce of the land is merely the *raw material of a manu-*
"*facture, and the manufacture not the necessary mode of enjoying*
"*the land*, there he is a trader within the bankrupt laws." 1 Term Rep. 34.

Therefore where a person rented a piece of ground *merely and solely for the purpose of making bricks for sale*, the court of king's bench held that he might be a bankrupt. Wells v. Parker, Mich. 26 Geo. 3.

8. "A person may be a bankrupt who has traded with
"this country, though he has resided entirely abroad." 1 Term Rep. 34.

*For where a gentleman of the *Temple* went to *Lisbon*, *P. 306.
where he turned factor, and traded with this country, he was held to be liable to the bankrupt laws by reason of his trading and gaining a credit here. Bird v. Sedgewick, Salk. 110.

9. The daughter of a freeman of *London*, who trades separately from her husband, or any feme covert trading separately from her husband in *London*, may by the custom become a bankrupt. Ex parte Carington, 1 Atk. 206.

2. *Of the Act of Bankruptcy.*

What are acts of bankruptcy are declared by several statutes.

1. By stat. 13 *Eliz. c.* 7. 1 *Jac.* 1. *c.* 15. "Departing from
"the realm with a view to delay or defraud creditors is an
"act of bankruptcy."

"But in this case it must appear that the departure was
"*for the purpose of delaying or defrauding creditors*, if in fact
"the creditors are not delayed or defrauded."

For where it appeared that the bankrupt had fled and gone abroad *for killing his wife*, Ch. Just. *Reeves* held, that shewing *quo animo* it was done, might prevent such departure from being construed an act of bankruptcy, but it appearing in fact that by such departure the creditors were delayed and defrauded, Cited in Degolls v. Ward, Hil. 12 G. 2. Bull. N. P. 39.

*P. 307. *defrauded, he then held it an act of bankruptcy, though this case might also fall under the second description of acts of bankruptcy, *viz.*

2. By stat. 34. 35. *H.* 8. *c.* 4. it is enacted, "That with-"drawing out of the king's dominions into foreign parts, "with intent *there to remain* and so defraud creditors, and "not returning within three months after proclamation is "an act of bankruptcy."

So that under this statute a person departing the realm *with the consent of his creditors* may be a bankrupt, *by remaining abroad*, though under the former he could not.

3. A third act of bankruptcy is by stat. 13 *Eliz.* *c.* 7. and 1 *Jac.* 1. *c.* 15. which enacts that, "Beginning to keep house, "so that he cannot be seen or spoken to by his creditors is "an act of bankruptcy."

Bull. N. P. 39.

1. On this part of the statute, being denied when at home is an act of bankruptcy, but in this case it must appear that the denial was *with intent to delay creditors:* for if the party be ill in bed when denied, or the creditor calls at an unseasonable hour of the night, or he is in company, such will be no act of bankruptcy.

Per Lord Hardwicke, 1 Atk. 201.

Field v. Bellamy, Hil. 15 G. 2. Bull. N. P. 39.

And on the same ground where the person was denied by agreement, in order to ground a commission on it, Ch. Just. *Lee* held it not to be an act of bankruptcy.

*P. 308. *Though here, where the case was, that the party (in consequence of an agreement made at a meeting of the creditors two hours before, at which he and the plaintiff were both present) was denied to the plaintiff's clerk who came to demand money, Justice *Foster* held this to be a sufficient act of bankruptcy. But Judge *Buller* puts this with a *quære*: though perhaps the distinction may be, that the parties who have so concerted the act of bankruptcy cannot afterwards say that the commission was fraudulently taken out: but such act would not be effectual against persons not privy to it.

Bromley v. Mundee, G. Hall. 2d June, 1756. Bull. N. P. 39.

1 Bur. 484.

And where *being denied* is the act of bankruptcy relied on, circumstances may be shewn, that he did not do it to avoid payment, but on account of sickness or particular business.

2. "So the denial must be *to a Creditor*."

Jackman v. Nightingale, Pasch. 13 Geo. 2. Bull. N. P. 40.

For though a man with intent to delay his creditors orders himself to be denied, yet unless he in fact be denied *to a creditor*, it is no act of bankruptcy—therefore it is necessary to prove that the person denied was a creditor.

‡Barrow v. Forster, Per Lord Camden, Norwich Sum. assizes, 1765.

‡And in this case it was held that being denied to a person who came *on behalf* of a creditor was not sufficient, though it was given in evidence that the bankrupt was afterwards denied to many creditors, and so continued to be till the commission was sued out.

But a clerk calling with a bill of the house to which he belongs is a sufficient creditor within * the meaning of these cases, as I have seen often in practice.

*P. 309.

†And ſo therefore it muſt appear that a *debt is actually due*, as if a creditor by *note payable at a future day* calls, being denied to him, is not an act of bankruptcy, as he is not *then* a creditor. †Green Bankrupt Law, 45. †Per Ld. Talbot, 7 Vin. Ab. 61.

3. But a *banker's* ſtopping or refuſing payment is not an act of bankruptcy, for it is not within the deſcription of any of the acts of bankruptcy, and there may be good reaſon for doing ſo, as ſuſpicion of forgery or the like. And if in conſequence of that refuſal he is arreſted and puts in bail, it is no act of bankruptcy. Moſely 3. 7 Vin. Abridg. 6. pl. 12 in marg.

4. "Departing from his dwelling houſe or otherwiſe abſenting himſelf is another act of bankruptcy by ſtat. 13 "*Eliz. c.* 7. and 1 *Jac.* 1. *c.* 15."

As where it appeared that the bankrupt had gone out of town on the morning of the 28th of *November* and returned in the evening, before which time a bailiff had been at his ſhop to arreſt him, and the next morning he ſent for the bailiff and told him, that he had gone out of town that day in order to get the term of the plaintiff, and now that the return of the writ was out, that if he would take out a new writ, that he would give bail, which was done accordingly. This was held to be clearly an act of bankruptcy, being a departing from the houſe with intent to *delay and defraud a creditor*. Maylin v. Eyloe, 2 Stra. 809.

2. "But the abſenting himſelf muſt be to avoid the *payment of a debt*."

*For if a man abſents himſelf for fear of being arreſted by an *attachment out of chancery*, for *non-payment of money* decreed, that will make a man a bankrupt. *P. 310. Com. Dig. 523.

But if a man abſents himſelf for fear of being arreſted by *capias de excommunicato capiendo*, that will not make him a bankrupt. Ibid.

So in this caſe Lord Ch. Juſt. *Willes* was of opinion that a perſon's abſconding to avoid *an attachment for non-performance of an award*, in not delivering goods in purſuance of the award, was not an act of bankruptcy, for it was not within the words of the ſtat. 1 *Jac.* 1. *c.* 15. which makes it an act of bankruptcy in a perſon to keep out of the way or depart from his dwelling *to avoid the payment of a juſt and true debt*, but the delivery of goods was rather *a duty*, and Lord *Hardwicke* afterwards recognized this diſtinction between a debt and a duty as the true one. Lingood v. Eade, 1 Atk. 196.

5. "The next act of bankruptcy I ſhall conſider is, being arreſted for debt and lying in priſon two months on that or any other arreſt or detention for debt, which makes him a bankrupt from the time of the firſt arreſt: or willingly and fraudently procuring himſelf to be arreſted." By ſtat. 1 *Jac.* 1. *c.* 15. § 21. *Jac.* 1. *c.* 19.

Under this part of the ſtatutes it has been held

1. That though the words of the ſtatute are, that he ſhall be Came v. Colman, Salk. 109.

*P. 311. Tribe v. Webber, Hil. 17 Geo. 2. C. B. Bull. N. P. 38. S. P.

* be a bankrupt *from the time of the first arrest*, yet that if a trader is arrested and puts in good bail, but afterwards surrenders himself in discharge of his bail, he shall only be a bankrupt *from the time of his surrender*.

†Rose v. Green, 1 Burr. 437. Bull. N. P. 39. S. C.

†But where *sham bail is put in before a judge* as a means to get defendant turned over to the prison of the court, and he is *eo instante* surrendered by his bail, this shall be considered as a mere evasion and a continuation of the first arrest, and the bankruptcy shall relate *to the first arrest*.

‡1 Burr. 439.

‡2. To make the procuring one's self fraudulently and willingly to be arrested, an act of bankruptcy, it must *be on a feigned action or a sham debt*.

Com. Dig. 523.

6. Another act of bankruptcy is "After having been arrested, *escaping*, where the debt is 100*l.* or suffering himself *to be outlawed*." By stat. 21 *Jac.* 1. *c.* 19.

Rose v. Green, 1 Burr. 437.

But an escape to become an act of bankruptcy under this clause in the statute must be *against the consent of the sheriff or officer*, not a constructive one, as being out of the sheriff's bailiwick, in passing through a different county in the custody of the sheriff.

Croxton v. Hodges, Per Fortescue at Hereford, 4 Geo. 2. Bull. N. P. 40.

But under these several clauses of the different statutes with regard to acts of bankruptcy created by arrests, it is to be observed, that a person's *giving money for notice when a writ comes into the sheriff's office against him* is no proof of an act of bankruptcy: for he may do it to prevent his creditor from being blown.

*P. 312. Com. Dig. 523.

*7. By stat. 1 *Jac. c.* 15. "Willingly or fraudulently procuring his goods or chattels to be sequestered or attached is another act of bankruptcy."

But this attachment or sequestration must be *by his own procurement*: for it is no act of bankruptcy if done without his knowledge.

8. Another act of bankruptcy is under stat. 1 *Jac.* 1. *c.* 15. "Making any fraudulent grant or conveyance of his lands, tenements or chattels." Under this statute it has been held,

Clavey v. Hayley, Cowp. 427.

1. That the conveyance which shall be an act of bankruptcy under this head must be *by deed*; and *a fraudulent judgement and execution*, though void as against creditors, not an act of bankruptcy.

Wilson v. Day, 2 Burr. 827.

2. Every assignment by a trader who becomes insolvent not an act of bankruptcy, for a bankrupt may lawfully prefer one creditor to another, as he may make a mortgage him, but *it must be with possession delivered*, except in the case of a ship at sea. So the bankrupt may assign over *part* his property to a fair creditor in discharge of his debt, and it shall be good.

Hooper v. Smith, 1 Black. Rep. 441.

As where *Hooper* the bankrupt being fairly indebted to the plaintiff, who was his mother, in 800*l.* but finding himself declining, before any act of bankruptcy, assigned to her a parcel of silks, amounting to about 350*l.* which was about

his stock in trade; of this he made a *bill of parcels with a receipt as if ſold in the ordinary courſe of trade, and afterwards conveyed the goods to her. In the evening of the ſame day it was agreed, that he ſhould deny himſelf and ſo become a bankrupt. The aſſignees having poſſeſſed themſelves by ſtratagem of the ſilks, ſo aſſigned to her, ſhe brought *trover*, and the queſtion was whether the aſſignment was an act of bankruptcy and fraudulent.—The doctrine laid down by Lord *Mansfield* was, That if a man having previouſly committed an act of bankruptcy, in order to pay even a juſt debt, aſſigns *all his effects* to the creditor, or all to ſeveral creditors in *excluſion of any one or more*, that that is an act of bankruptcy, but that a preference by aſſignment to one creditor of *only part* of his goods, and that to pay only part of the debt, has been frequently held good. Though if a man makes over ſo much of his ſtock, as diſables him from being a trader, it would be fraudulent, but to ſay that half the ſtock would have that effect, would be going too far. *P. 313.

The doctrine here laid down has been confirmed by many caſes. As

1. An aſſignment by a trader before an act of bankruptcy *of all his property real and perſonal*, though given by way of ſecurity and for a valuable conſideration, was in this caſe adjudged to be a fraud on the bankrupt laws and an act of bankruptcy. Aſſignees of Sladers v. Demattos, 1 Burr. 567.

2. The bankrupt in this caſe aſſigned in conſideration of 200*l.* two leaſehold houſes and *all* *his *ſtock in trade* to the plaintiff to ſecure that ſum, but *the houſhold goods and debts were not included*, the mortgage was forfeited, and in conſideration of 40*l.* he bargained and ſold his houſhold goods, *but not the debts*, (which were trifling) to the plaintiff to ſecure the 340*l.* The aſſignees took poſſeſſion of the goods, on which the plaintiff brought trover, and on a ſpecial caſe made, the court determined, that the aſſignment was an act of bankruptcy, for it being of all his ſtock and trade, he could not carry on buſineſs longer. Law v. Skinner, *P. 314. 2 Black. Rep. 996.

3. An aſſignment of the bankrupt's property *to the excluſion of any of the creditors* is an act of bankruptcy. As was held in this caſe, where one *Gayner*, a trader, on the 7th of *June*, made an aſſignment of all his effects, goods, ſtock in trade, &c. (except his houſhold furniture, watches, plate, bills and caſh then by him) to truſtees, in truſt to pay themſelves and all the reſt of the creditors except *Ford* the petitioner. The truſtees declining to act under this aſſignment, he executed another on the 9th of *June*, wherein the truſtees were to pay themſelves and all the creditors mentioned in a ſchedule, (in which ſchedule *Ford*'s name was omitted,) and in this aſſignment a large parcel of ginger was excepted. On this coming before Lord *Hardwicke*, he was clearly of opinion, that the deed of the 9th of *June* was of itſelf an act of bankruptcy. Before Lord Hardwicke, 31 July, 1755. in Lincoln's Inn hall. Green's Bank. Law, 53. 1ſt. edit.

But

But how far a *general assignment* to trustees for the *benefit of all the creditors* of the bankrupt is an act of bankruptcy, this case following goes some length to decide.

*P. 315. Kettle & al. Ass. v. Hammond. Sittings after Hil. 7 G. 3. Bull. N. P. 40.

*In trover against a sheriff who had levied an execution on the bankrupt's goods; to prove an act of bankruptcy prior to the execution, the plaintiffs relied on an assignment made by the bankrupt of all his effects to two of his creditors, in trust for themselves and the rest of the creditors, in consequence of a proposition made by the bankrupt at a meeting of his creditors, and accepted by all present. *Per* Lord *Mansfield*, this deed is a fraud on the bankrupt-laws, and is an act of bankruptcy unless every creditor concurred, which here is not the case, the plaintiff in execution being adverse.

4. But it should seem that those partial assignments must be made only with a view to satisfy the creditors to whom they are made, for if done *for the purpose of defrauding the other creditors*, and to give an undue preference, or made under circumstances when the trader cannot longer stand his ground, they are fraudulent, and acts of bankruptcy.

Devon v. Watts. Dougl. 86. Linton v. Bartlett. 3 Wilf. 47. S. P.

For where a trader *being in insolvent circumstances* and unable to pay more than eight shillings in the pound, made an assignment, *in contemplation of a bankruptcy*, of a lease, to certain of his creditors, this was adjudged to be an act of bankruptcy, though it was an assignment of but *part of his property*.

Harman v. Fisher. Cowp. 117. *P. 316.

So where defendant having, in order to support the credit of the bankrupt's house, immediately before its stoppage, lent the bankrupt 5000*l.* and he on the evening before he absconded inclosed bills to the plaintiff to the *amount of 5000*l.* in a letter, in which he mentioned his having done so, as conceiving him *entitled to a preference*, the money was recovered back.

Rust v. Cowper. Cowp. 629.

"The court therefore allows no evasion of the statute." As where the bankrupt made *a pretended sale* of part of his effects to his creditor, but which were *not in the way of the creditor's trade*, nor was there *any application or pressing for payment by the creditor*, but done by the bankrupt to give him a preference, it was held to be fraudulent.

Hague v. Rolleston. 4 Burr. 2174. Alderson v. Temple. 4 Burr. 2235. S. P. Thompson v. Freeman. East. 26 G. 3. 1 Term. Rep. 155.

And even if the assignment is in the way of the creditor's trade or business, yet if it is done *in contemplation of a bankruptcy*, it is void.

But if a trader being fairly indebted and *apprehensive of being sued*, before any act of bankruptcy, assigns over to his creditor part of his property, though in fact his *apprehensions are groundless*, yet is the assignment good.

9. "Obtaining any protection, otherwise than being lawfully protected by privilege of parliament is another act of bankruptcy." By stat. 21 *Jac.* 1. *c.* 19.

Of this sort was the entering into the service of an ambassador. But now, by stat. 7 *Ann. c.* 12. it is enacted, "That any person being a merchant or trader, who shall go into

"into the ſervice of any ambaſſador or foreign miniſter, "ſhall not have any privilege."

*10. Another act of bankruptcy is "Paying to the petition- *P. 317.
"ing creditor, or delivering to him goods or ſecurity for "his debt whereby he ſhall have privately more in the pound "than other creditors," by ſtat. 5 *Geo.* 2. *c.* 30. § 19.

11. "Neglecting to make ſatisfaction for any juſt debt to "the amount of 100*l.* within two months after ſervice of "legal proceſs, upon *any trader having privilege of parlia-* "*ment*, is another act of bankruptcy," by Stat. 5 *G.* 2. *c.* 30. § 24.

But it is further enacted by ſtatute 4 *Geo.* 3. *c.* 33. § 1. "That before any commiſſion can be ſued out againſt a "member of parliament, it is required, That the creditor "make and file on record in one of the courts at *Weſtmin-* "*ſter* an affidavit, that the debt is juſtly due to him, and "that his debtor as he verily believes is a merchant, *&c.* "and within the deſcription of perſons who are objects of "the bankrupt-laws."

And note, That if a man commits a *plain act of bankruptcy*, as keeping houſe, *&c.* though he afterwards goes abroad and is a great dealer, yet that will not purge the firſt act of bankruptcy. But *if the act is doubtful*, then going abroad and dealing will be an evidence to explain the intent of the firſt act: for if it was not done to defraud creditors and keep out of the way, it will not be an act of bankruptcy: alſo if after a plain act of bankruptcy he pays off or *com- *P. 318.
pounds with his creditors, he is become a new man.

Hopkins v. Ellis. Salk. 110.

Therefore where a trader was denied to a creditor who called in the morning with a bill for payment, though by the cuſtom of the city he had till five o'clock in the evening to pay it, and in fact did pay it in the courſe of the day, yet it was reſolved, That having committed an unequivocal act of bankruptcy by the denial, it could not be purged or explained away by any ſubſequent circumſtances.

Colkett, aſſ. of Falch, v. Freeman. Mich. 28 Geo. 3. 2 Term. Rep. 59.

3. The next thing to be conſidered is,

The Debt of the Petitioning Creditor.

1. By ſtat. 5 *Geo.* 2. *c.* 30. It is enacted, "That no commiſſion of bankruptcy ſhall be ſued out upon the petition of one or more creditors, unleſs the ſingle debt of the creditor or of two or more perſons being partners petitioning for the ſame, does amount to 100*l.* or upwards, or unleſs the debt of two creditors amounts to 150*l.* or of three or more creditors to 200*l.* and the creditor or creditors petitioning for ſuch commiſſion ſhall, before the ſame ſhall be granted, make oath of the truth and reality of ſuch debt."

1. In this caſe the bankrupt was fairly indebted to the petitioning creditor in upwards of 100*l.* but before the commiſſion was ſued out, he had given to the creditor a bill of exchange, which reduced the debt to within 100*l.* but this bill of exchange,

Brookſdike v. Bolman, Mich. 27 Geo. 3. B. R. 1 Term Rep.

*P. 319. change was drawn on a perſon with *whom the bankrupt had no dealing, and which was of courſe *not accepted*, the petitioning creditor kept the bill and *gave no notice to the bankrupt of the non-acceptance*, and ſued out the commiſſion on the whole debt, in an action in which the bankruptcy came in queſtion, it was inſiſting that the petitioning creditor having neglected to give notice of the non-acceptance of the bill, *had by his laches made it his own*, and that therefore the petitioning creditor's debt being leſs than 100*l.* that the commiſſion was irregular; the point being reſerved, the court was of opinion, that the bill being drawn on a perſon who had no effects of the drawer in his hands, that the notice of the non-acceptance was unneceſſary, as he never could ſuſtain an injury for want of notice, and that ſo there could be no extinguiſhment of the amount of the bill of exchange, and that the petitioning creditor's debt was therefore ſufficient.

2. " Under this ſtatute the petitioning creditor's debt " muſt be *a legal one*."

Medlicott's caſe in canc. 2 Stra. 899.

For where the petitioning creditor's debt was *as aſſignee of a bond due by the bankrupt*, the commiſſion was ſuperſeded for he was only an *equitable creditor*.

Ex parte Hylliard, 1 Atk. 147.

So where one *Alſworth* having entered into an agreement to purchaſe from *Hylliard*, an equity of redemption of an eſtate then in mortgage, for which he was to give 400*l.* and articles were ſigned accordingly. *Alſworth* paid 250*l.* and was to pay the other 150*l.* on the execution of the conveyances, but *Hylliard* refuſed to *complete the purchaſe, upon which *Alſworth* ſued out a commiſſion of bankrupt on the debt of 250*l.* On a petition to ſuperſede it, Lord *Hardwicke* doubted, whether a commiſſion could be taken out on ſuch a contract, for the remedy ſhould have been a bill for performance of the contract, and no action could in ſtrictneſs of law be maintained. But it appearing that ſince the iſſuing of the commiſſion, *Alſworth* had taken an aſſignment of the mortgage, which he could hold till ſatisfied, he ordered the commiſſion to be ſuperſeded.

*P. 320.

3. " The debt muſt be a legal and good debt *for which* " *action can be maintained*."

Barnaby's caſe, 1 Stra. 653.

For where a judgment had in this caſe been recovered againſt a bankrupt, he was ſurrendered by his bail, and thereupon charged in execution, after which the plaintiffs in that action ſued out a commiſſion of bankrupt grounded on the debt for which the judgment had been obtained. The commiſſion was ſuperſeded, the body of the debtor being in law a ſatisfaction for the debt.

" So a *debt barred by the ſtatute of limitations* is not a good " petitioning creditor's debt."

Quantock v. England, 2 Bur. 2628.

But to make ſuch debt an inſufficient one to ſupport a commiſſion, the *objection muſt come from the bankrupt himſelf* who on ſuch ground may ſuperſede the commiſſion, for the objection, that the debt was barred by the ſtatute of limi-

tion, will not lie in the mouth of a * perſon ſued by the aſ- *P. 321.
ſignees; for *the debt is not extinguiſhed* by the limitation, and the bankrupt has acquieſced in it: neither will the court preſume a debt to be barred though ſix years have elapſed.

So where the debt due to the petitioning creditor was by *bond*, which was *not due at the time of ſuing out the commiſſion*, the debt was held to be a bad one to ſupport the commiſſion. Ex parte James, 1 P. W. 610.

An exception to this rule, is that clauſe in the ſtatute 5 *Geo. 2. c.* 30. which now allows creditors to the bankrupt by bills, bonds, or promiſſory notes payable at a future day, to petition for, or join others in petitioning for a commiſſion of bankruptcy. But this being made expreſsly ſo by ſtatute rather confirms the rule above laid down.

4. "The debt muſt be a ſubſiſting debt *at the time of the "act of bankruptcy committed.*" Vid. Greens Bank. Law, 80. contra.

For where in this caſe the petitioning creditor's debt was under a note drawn by the bankrupt after an act of bankruptcy committed, the commiſſion was ſuperſeded, the debt being a bad one. Toms v. Mitton, 2 Stra. 744.

But where the petitioning creditor's debt was a note of 200*l.* given by the bankrupt to *A. B.* before any act of bankruptcy, but *indorſed by* A. B. *to the petitioning creditor after an act of bankruptcy committed*, the debt was held to be ſufficient to ſupport the commiſſion, the * debt being due by the bankrupt when he became ſo. Anon. 2 Wilſ. 135. Ex parte Thomas, 1 Atk. 73. *P. 322.

So where the bankrupt was indebted to the petitioning creditor by ſimple contract and after a ſecret act of bankruptcy committed *gave him a bond for the money*: it was held that the bond did not ſo deſtroy the ſimple contract debt but that it was a good debt whereon to ground a commiſſion. Ambroſe v. Clendon, 2 Stra. 1042.

5. "But the debt on which the commiſſion is grounded, "need not have been *contracted during the time that the bank-"rupt carried on trade.*"

For a debt contracted *before a man entered into trade*, will be a good one, to ſupport a commiſſion. Butcher v. Eaſto. Dougl. 282.

And therefore that reſolution, that a trader cannot be a bankrupt for a debt contracted after he has left off trade, though he afterwards becomes a trader again, ſeems not to be law, ſince by the caſe of *Butcher* v. *Eaſto*, it is indifferent at what time the debt has been contracted. 1 Sid. 411.

But where a *man has quitted trade*, he ſhall not be liable to be made a bankrupt, on account of his former trading, for after contracted debts, though for a debt contracted during the trading he may, and even though after quitting trade he ſells his remaining ſtock. Sir R. Cotton and al. v. Daintry and Sir And. Bateman.

And therefore where a trader was indebted while in trade in 100*l.* and then quitted trade, and became indebted to the ſame 1 Sid. 411. Meggott v. Mills,

*P. 323. 1 L. Raym. 287. 12 Mod. 159. same creditor in * another 200*l.* he afterwards paid 100*l.* to his creditor, without saying upon what account; *Holt*, Ch. Juſt. ſaid that it would be too rigorous not to allow this payment to be appropriated to the 100*l.* debt contracted while the debtor was in trade, ſo as to ſuffer him to be ſtill liable to a commiſſion of bankrupt: but he gave no abſolute opinion on it.

6. *In general*, the following have been allowed to be good petitioning creditor's debts, to ſupport the commiſſion.

Per L. Hardwicke, 1 Atk. 241. 1. *An arbitration bond*, for it is a debt at law, and binds the parties till ſet aſide for corruption or partiality, and therefore may well ſupport a commiſſion.

Ex parte Lee 1 P. W. 782. 2. The petitioning creditor's debt in this caſe amounted to 100*l.* but it was in *notes of the bankrupt bought in at ten ſhillings in the pound*, it was held to be a good debt to ſupport the commiſſion, though it had been otherwiſe in the caſe of a bond.

Anon. Moſeley 27. 3. Where an order was made that a ſolicitor's bill ſhould be referred to a Maſter to be taxed, and that *all proceedings at law ſhould in the mean time be ſtayed*, and while the bill was under taxation, the ſolicitor ſued out a commiſſion *for the debt due by his bill*; on a petition to ſuperſede it, it was held to be not a ſufficient reaſon to ſuperſede the commiſſion, for the order for taxation extended only to the bringing of actions at law and the other ordinary proceedings.

*P. 324. Ex parte Criſp. 1 Atk. 134. ‖Ex parte Goodwin, 1 Atk. 100. * 4. A commiſſion may iſſue *againſt one partner for a debt due by the partnerſhip.*

‖5. *The executor of a bankrupt* cannot ſue out a commiſſion grounded on a debt due to his teſtator, unleſs the commiſſion againſt his teſtator has been ſuperſeded, for all debts due by him belong to his *aſſignees.*

4. The *Commiſſion* is next to be proved, which is done by producing it under the great ſeal, and the petition to the Chancellor on which it was granted.

5. The next thing requiſite to be proved in actions by the *aſſignees* of the bankrupt, is

The Aſſignment.

This is to be done by producing the deed itſelf, and proving the execution of it by the commiſſioners by the ſubſcribing witneſs.

6. The laſt thing to be conſidered under this head is,

Property in the Bankrupt.

This includes every thing of which he is the viſible or reputed owner. Every thing of which he has the actual poſſeſſion, or of which he has parted with or loſt the poſſeſſion after an act of bankruptcy committed or in contemplation.

1. *Of things of which he has poſſeſſion, or is the real or viſible owner.*

1. To prevent a trader from injuring others by deriving credit from an appearance of ſtock or property which is not his own, it is enacted, by ſtat. 21 *Jac.* 1. *c.* 19. § 11. "That

" if any * perſon ſhall at the time of his becoming a bank- *P. 325.
" rupt, have in his poſſeſſion, by conſent of the true owner,
" any goods whereof he is the reputed owner, that the
" commiſſioners ſhall have power to ſell the ſame."

Under this ſtatute it has been held,

1. That it extends to *mortgages* or conditional ſales as well as to abſolute ones, ſo that where in this caſe a trader had mortgaged his goods, ſtock in trade, &c. and the mortgagee ſuffered him to remain in poſſeſſion, it was adjudged to be within the ſtatute, and void as againſt creditors. Ryall v. Rolle. 1 Atk. 165. 1 Wilſ. 260.

2. That it extends to choſes in action, as bonds, profits in trade, &c. S. C.

3. That though the mortgage is *to a partner*, who thereby is in poſſeſſion, yet that the mortgage is void within the ſtatute, if ſuch partner allows the mortgagor to continue in poſſeſſion and appear ſtill as a partner; for the opportunity of fraud is the ſame, and it is within the miſchief of the ſtatute. S. C.

2. " But the ſtatute does not extend to aſſignments of
" *ſhips or cargoes beyond ſea.*"

For where *Williams* and *Wilder* being partners, aſſigned to *Heathcote*, to whom they were indebted, two ſhips together with the bills of lading and policies of inſurances on the goods on board; *Williams* and *Wilder* became bankrupts and the aſſignees brought their bill againſt *Heathcote*, grounding themſelves on the * ſtatute 21 *Jac.* no poſſeſſion having been delivered. But Lord *Hardwicke* was of opinion, that the ſtatute extended only to caſes, where the aſſignee *could obtain poſſeſſion of the goods aſſigned*, but which he left in poſſeſſion of the aſſignor and ſo gave him a falſe credit, which caſe did not hold here, *the ſhips being then abroad* on their voyage. Brown v. Heathcote. 1 Atk. 160. *P. 326.

3. " So neither does the ſtatute extend to caſes of goods ſold by the bankrupt of which he has only the *temporary poſſeſſion after the ſale.*"

For where *Matthews* the bankrupt, having 500 barrels of tar, ſold two thirds of it to *Flyn* and *Field*, and it was agreed that *Matthews* ſhould alſo ſend to them the other third on his own account, but that he ſhould be at the expence of cartage, porterage, and ſhipping, and that he ſhould *lodge all the tar in a warehouſe of his own*, till an opportunity of ſhipping it offered, there being none at that time; the tar was accordingly lodged in *Matthews*'s warehouſe; *Flyn* and *Field* paid for their part, *Matthews* became a bankrupt, and the tar was taken poſſeſſion of by his aſſignees, but Lord *Hardwicke* held this not to be a caſe within the ſtatute. For the words of the ſtatute are " goods left in the *poſſeſſion, order, and diſpoſition* of the bankrupts," which theſe cannot be ſaid to be, being merely temporary and for a particular purpoſe. Flyn & Field in re Matthews. 1 Atk. 185.

4. The ſtatute extends as well to goods entruſted to the bankrupt by a third perſon, and of which by diſpoſing of them he is the viſible owner, as to caſes where the bankrupt Mace v. Cadell. Cowp. 232.

*P. 327. himself * being the original owner, remains in possession after having sold them, for the mischief is equal of creating a fictitious credit.

"But in such case the bankrupt must *appear as the owner*, "for if from the nature of his business the presumption of "the goods being his property is excluded, they shall not "be liable to his bankruptcy."

L'Apostrie v. Le Plaistrier. 1 P. W. 318. Such is the case of *Goldsmiths and Factors*, who do not deal on their own stock but that of others. As in this case, which was trover against the assignee of one *Levi*, to whom before his bankruptcy the plaintiff had entrusted a parcel of diamonds to sell; on a case made, the court of king's bench were of opinion, that the bankrupt having no more than a *bare authority to sell for his use*, that they were not liable to *Levi*'s bankruptcy.

"So in the case of factors, goods consigned to them "merely for sale are not liable to their bankruptcy."

Godfrey v. Furzo. 3 P. W. 185. For if a merchant consigns goods to a factor, and he becomes a bankrupt, the goods still remaining in his possession they shall still be deemed the property of the merchant, and he may recover them in this action.

Whitcomb v. Jacob. 1 Salk. 160. So if the factor had sold the goods consigned to him and received the money, and died indebted in debts of an higher nature, if it could be proved that the money so received had been invested in other goods, these shall be deemed to be

*P. 328. long to the merchant's estate, not to the * factor's. But if the money had remained in specie, it had belonged to the factor's estate, and gone to answer the debts of an higher nature, for the money has no mark to be followed by.

Per Lord Hardwicke. 1 Atk. 234. But if the factor had for the merchant's goods taken *notes* instead of money, the court of common pleas held that the merchant should have the notes, as they could be traced.

Scott v. Salmon. Hill. 16 Geo. 2. C. B. Bull. N. P. 43. And so if a factor had sold the goods consigned to him and become a bankrupt, the merchant must come in as creditor under the commission. Though if he had *laid out the money in other goods* for the merchant, the merchant shall have them: so if the factor had sold for payment at a future day, the merchant shall have the money.

5. "So that the criterion of what possession shall subject "the goods of others in a trader's possession to his bank- "ruptcy is the exertion of any act of ownership unconnect- "ed with any circumstances of doubtful property, or that "appearing to have such power and right."

Walker v. Burnell. Dougl. 303. Therefore where a bankrupt was left in possession of house and goods by his assignees, after obtaining his certificate, *for the purpose of collecting his debts*, and during that time traded for himself, it was adjudged, that this was not such a possession as should subject them to be taken by the assignees under a second commission.

2. Th

2. These are cases in which the bankrupt is in poſſeſſion of goods at the time he becomes a bankrupt, and which are recoverable under the circumſtances now mentioned. But goods of which he has not the poſſeſſion, if they have got into the hands of others after an act of bankruptcy committed, are in like manner recoverable in this action. *P. 329.

For the aſſignment of the bankrupt's property has a relation to the act of bankruptcy and the aſſignees ſtand in the bankrupt's place from that time, that is, the property is in them from that time, and they may maintain trover for all goods of the bankrupt of which others have obtained poſſeſſion from that period. Monk v. Morris, 1 Vent. 193.

Where the aſſignment of the goods is itſelf an act of bankruptcy, and ſo the goods aſſigned are recoverable in this action has already been mentioned. Where an act of bankruptcy has been committed, and any perſon obtains poſſeſſion of them *afterwards by any means*, they are in like manner recoverable.

As where the bankrupt had been arreſted on the 2d of *May*, and on the 4th was charged in execution: on the 17th of *June* a *fieri facias* iſſued againſt him to the defendant the ſheriff, who on the 26th levied the money: on the 5th of *July* the commiſſion was taken out on the act of bankruptcy of lying in gaol two months, after which the ſheriff returned *nulla bona*, and the return was adjudged to be good, for by the relation the property was in the aſſignees from ſecond of *May*. Coppendale v. Bridgen 2 Bur. 814.

*So where the defendants, who were ſheriffs of *London*, had ſeized the goods of the bankrupt, after an act of bankruptcy committed, but before a commiſſion had been ſued out: but before a ſale, a commiſſion had been ſued out, and an aſſignment made, notwithſtanding which defendants ſold them; they were held to be liable in trover. *P. 330. Cooper v Chitty and Blackiſton, 1 Burr. 20. 1 Black. Rep. 65. S. C.

†Or the action may be maintained againſt the plaintiff who ſued out the execution as well as againſt the ſheriff, if he can be proved a party to the converſion by giving bond to ſecure the ſheriff and ſo making the act his own. † Ruſh v. Baker 2 Stra. 996.

But to this there are two exceptions.

1. Where an *extent iſſued on a ſtatute* and the conuſor became bankrupt after the execution of the extent, but *before* the *liberate*; in trover by the aſſignees againſt the defendant who had got poſſeſſion under the liberate, the court held that the property was diveſted out of the bankrupt by the extent and that the goods were therefore not aſſignable. Note, the extent was of the 21ſt, of *October*, the act of bankruptcy was on the third of *November*, the liberate was ſued out on the 6th. and the commiſſion iſſued the 8th. of the ſame month. Audley v. Halſey, Cro. Car. 106—148.

2. The ſecond exception is in the *caſe of the crown*, for the king is not bound by any of the ſtatutes of bankruptcy, he not being named in them, ſo that he is not affected by the relation, 1 Atk. 262

relation, but only by the *actual assignment* which changes the property.

*P. 331. Brasſey v. Dawſon, 2 Stra. 978.

*As where the bankrupt was *indebted to the king, as collector of the land tax* for the precinct of *Aldgate*, and the commiſſioners of the land tax iſſued their warrant and *ſeized his effects after an act of bankruptcy committed*, but the goods were not taken away till after the aſſignment under the commiſſion; it was held that the goods being in the hands of the crown from the time of the ſeizure, were not affected by the act of bankruptcy which preceded it.

Rex v. Crump and Hanbury, Parker's Rep. 126.

So where one *Edward Lewis* was indebted to the king by bond dated the 3d. of *March* 19 *Car.* 2. an extent iſſued upon that bond teſted the ſame day with the date of the aſſignment under a commiſſion of bankruptcy againſt *Lewis*; when it was held that the extent ſhould be preferred.

Stracey v. Hulſe Dougl. 395. Rex v. Fowler and Attorney General v. Senior. Ibid. S. P.

So where it is enacted by ſtatute 8 *Ann. c.* 19. "That all "candles and all the materials for making them ſhould be "ſubject to the debts and duties to the crown, and all pe"nalties and forfeitures for the ſame." It was adjudged that where a candle-maker was in debt for the ſingle duties and became a bankrupt, and *after the aſſignment* was convicted in the double duties, that this was a lien on the candles, utenſils, &c. in the hands of the aſſignees, and might be taken from them under the ſtatute *notwithſtanding the aſſignment*, for the aſſignees are the repreſentatives of the bankrupt, and they are liable to every equity that would affect him.

*P. 332. Rex v. Mann. 2 Stra. 729.

* Therefore where an extent iſſues it ſhall always be *teſted of the true day it iſſues*, and ſhall not be *ante-dated* ſo as to over-reach any meſne aſſignments.

3. How far in the caſe of partners the acts of one ſhall affected by the bankruptcy of the other in the diſpoſal of t bankrupt effects, *vid. Fox* v. *Hanbury*, *poſt.* 338.

I ſhall now proceed to conſider,

2. TROVER WITH REFERENCE TO TH PERSON.

Under this head I ſhall conſider, 1ſt. By whom this tion may be maintained. 2d. Againſt whom it lies.

1. *By whom Trover may be maintained.*

1. "*Poſſeſſion* alone gives a ſufficient title to maintain "action againſt all perſons, except againſt the owner."

Armorie v. Delamirie, 1 Stra. 505.

As where a perſon *finds any thing*, this gives him ſuc property as will maintain this action againſt any perſon takes it from him, except the rightful owner.

Baſſett v. Maynard, Cro. Eliz. 819.

So where *Sir Thomas Palmer* ſeiſed of a wood, ſold cords of the timber of it to one *Cornford* and his aſſign be taken *by the aſſignment of* Sir *Thomas Palmer*, and *Corn* aſſig

assigned his right to the plaintiff, *Sir Thomas* afterward sold 4000 cord of timber of the same wood to the defendant, *to be taken at defendant's election.* The 600 cord of wood was marked out by *Sir Thomas* to the plaintiff, who cut it, and defendant took it away, on which the plaintiff brought trover and recovered, for though defendant had a right to 4000 cord of wood *to be taken in any part of the wood*, yet plaintiff having cut and got possession of the wood had thereby a good and sufficient title. *P. 333.

So where plaintiff claiming a right of common had cut six load of rushes which grew thereon, and defendant denying plaintiff's right had taken and carried them away, plaintiff recovered in trover for them; for though the right of common might be doubtful, yet having by possession obtained a species of property in them, he could well maintain an action against a stranger. Rackham v. Jessup and Al. 3 Wilf. 332.

"But possession is *not necessary* to maintain this action."

For where in ejectment for a mine, it was offered in evidence in proof of possession, that the lessor of the plaintiff had had a verdict in trover for a parcel of lead dug out of the mine, it was held not to be sufficient proof of possession, as trover might be maintained without possession. Lord Cullen's Case, Mich. 14 G. 2. Bull. N. P. 33.

* "For a *right of possession* is sufficient."

As where *A.* being indebted to the plaintiff and defendant to *A.* and it was agreed between them that defendant should deliver goods to the plaintiff in satisfaction of *A.*'s debt, defendant did not do so, but converted them to his own use. It was held that plaintiff might maintain trover, *though he never had had possession of the goods.* *P. 334. Flewellin v. Rave, 1 Bulst. 68.

2. "But to support this action, *property* in the plaintiff is essentially necessary."

For where the plaintiff ordered a tradesman to send him goods by an hoyman, and the tradesman sent the goods by a porter to the house where the hoyman resided when in town, but he not being there, the porter left the goods with the landlord of the house and the goods were lost; it was held that *plaintiff* could not have trover for the goods, *for the property never vested in him for want of delivery*, but still remained in the tradesman: though it had been otherwise, had the delivery been to the servant of the hoyman or one employed by him to receive goods, for a delivery to them would have vested the property in the plaintiff. *Ante vol.* 1. *pag.* 11. Colston v. Woolston, Trin. 3 Ann. per Holt at G. Hall, Bull. N. P. 35.

So where plaintiff had exchanged an horse with defendant and given possession of it, it was held that though the exchange might have been unfair in the warranty, yet that trover would not lie for it, for *the property was gone out of the plaintiff by the exchange.* Power v. Wells, Cowp. 819. 2 Rep.

So

*P. 335. Ekins v. Smith, Sir Th. Raym. 336.

* So where *goods were condemned in the exchequer* and proclaimed as forfeited, it was adjudged, that *the property was thereby ſo altered* that neither treſpaſs nor trover would lie againſt the perſon who had ſeized them.

3. "But an *abſolute property* is not neceſſary, as a "perſon having a *ſpecial property* may maintain the action."

Wilbraham v. Snow, 1 Lev. 282. 1 Mod. 31.

As where the *goods are ſeized by the ſheriff under a fi. fa.* the ſheriff may maintain this action againſt any perſon for taking and converting them to his own uſe.

So *a carrier* may maintain trover for goods entruſted to him to carry, which have been taken out of his poſſeſſion.

Pr. Powell Midl. Circ. Bull N. P. 33.

So if an houſe let for years be blown down, *leſſee* may have trover for the timber though *the property be in the reverſioner.*

†Sir Wm. Courtney's caſe, Salk. MSS. Bull. N. P. 33.

†So *the lord of a manor who ſeizes an eſtray or wreck* may *before the year and day expired*, have trover for it againſt a ſtranger, for he has a poſſeſſion that may become a property.

‡Elizabeth Counteſs of Rutland v. Iſabell Counteſs of Rutland, Cro. Eliz. 377.

‡4. It was formerly the opinion that *executors* could not maintain this action (*Sawil*, 133) but it is now ſettled that they may have this action *for a converſion of goods in the life-time of their teſtators*, by the equity of ſtatute 4 *Ed.* 3. as well as for a converſion in their own times.

*P. 336. §Tremling v. Clutterbook, Style 48.

* Under this head it has been reſolved,

§1. That if *the wife is executrix*, the huſband may join in the action. For the poſſeſſion of the wife, as executrix, is the poſſeſſion of the huſband, and the damages recovered may concern them both.

‖Lord Haſtings v. Sir Archibald Douglas, Cro. Car. 343. 2 Vern. 246.

‖2. If the huſband deviſes away jewels or ſuch things as are *paraphernalia* to the wife, ſhe cannot hold them, but they are recoverable by the huſband's executor from her. But if the huſband dies *inteſtate* or *by will does not diſpoſe of the jewels*, &c. ſhe ſhall have them.

†Long v. Hebb Per Rolle Ch. Juſt. Style 341.

†5. *An adminiſtrator* may maintain this action for the taking of the goods of the inteſtate by one *before the letters of adminiſtration granted.* For the letters of adminiſtration relate to the death of the inteſtate.

‖1 Stra. 60.

‖So he may for a *taking in the life-time of the teſtator.*

§Anon. 1 Vent. 349.

Under this head it has been decided.

1. That an executor *de ſon tort* is liable to this action at the ſuit of the adminiſtrator.

§And though in ſuch action, it appeared that the goods for which the action was brought, had been taken in execution upon a judgment obtained againſt the defendant as executor *de ſon tort* by a creditor of the inteſtate, yet it was held to be no diſcharge, for men ſhould be diſcouraged from meddling with inteſta

inteſtate eſtates. Though this *had been a good diſcharge *P. 337.
againſt another creditor who ſued him in the ſame right.

2. If an adminiſtration has been granted to any perſon, and the adminiſtration is afterwards repealed, and adminiſtration granted to another, the firſt adminiſtrator ſhall not be liable in this action for the goods which he diſpoſed of, but all diſpoſitions by him made ſhall be valid. Wilſon v. Packman, Moor, 396. Cro. Eliz. 459. S. C.

3. It was held by two juſtices in this caſe againſt *Holt*, that where a perſon before adminiſtration granted to him, permitted a perſon to take the goods of the inteſtate, that this aſſent ſhould bar him in an action of trover for theſe goods brought after adminiſtration granted. Whitehall v. Squire. 1 Salk. 295. 3 Mod. 276. S. C.

6. *Baron and feme* may join in this action, for goods which were the property of the wife before marriage, and which goods came to the hands of the defendant before marriage, though they have been converted after, for though the converſion is the ground of the action, and therefore the huſband may ſue alone, yet the inception of the cauſe of action was in the wife, by the trover before marriage. Blackborn et Ux. v. Graves, 2 Lev. 107. 1 Vent. 260.

I ſhall now conſider.

2. *Againſt whom this action may be maintained.*

1. "The owner of goods may maintain trover for them "againſt any perſon into whoſe hands they may have fal- "len, though the perſon in whoſe poſſeſſion they are found "may have *honeſtly obtained it, provided it was not *by* *P. 338.
"*ſale in market overt* or *by other fair tranſfer*."

As where the plaintiff left jewels ſealed up with his banker for ſafe cuſtody only, and the banker broke open the ſeal and pawned the jewels to the defendant, the plaintiff brought trover for them, when it was adjudged. 1. That the banker being a mere bailee for ſafe cuſtody, had no authority to open the bag, and by ſo doing was a treſpaſſer. 2d. That the defendant could obtain no property in the jewels, except by a ſale in *market overt*. 3d. That pawning was no ſale in *market overt*, and therefore that the property ſtill remained in the owner (the plaintiff) who might therefore well maintain this action to recover them. Hartop v. Hoare. 1 Wilſ. 8. 2 Str. 1187. S. C.

So where the plaintiff gave lottery tickets to a goldſmith to receive the money for him, and the goldſmith having before given to the defendant a note to deliver to him ſo many lottery tickets, delivered to him the tickets he had received from the plaintiff: It was adjudged that this was not ſuch a tranſfer as changed the property, but that the plaintiff might maintain trover for them. Ford v. Hopkins. Salk. 283.

So where in trover for a horſe: it appeared that he had been ſtolen from the plaintiff by one *P.* who had ſold him to the defendant *under the name of Lyſter*, in market overt, and the aſſumed name of *Lyſter* was entered in the toll-book. It was adjudged by the court, that this ſale *being by a falſe name*, was not ſuch a ſale as ſhould alter the property. Gibbs' Caſe. 1 Leon. 158.

"But

*P. 339. *"But where there has been *a fair and regular transfer* of "the thing in question, this action will not lie."

Anon. 1 Salk. 126. As where a bank bill payable to *A.* or bearer, was lost by *A.* and found by a stranger who transferred it to the defendant. It was held, that though *A.* might have trover against the stranger, yet that it would not lie against the defendant, who by the fair course of trade had obtained a property in it. *Vide Miller* v. *Race.* 1 *vol.* 35.

2. "An actual conversion *to the party's own use*, is not ne- "cessary to maintain this action, *where the taking has been* "*tortious.*"

Tinkler v. Poole. 3 Wils. 146. 5 Burr 2657. S. C. Chapman v Lamb. 2 Stra. 943. As in the case of *goods seized by custom-house officers which are not liable to duties*, as the wearing apparel and necessaries of passengers on board ships; for these trover will lie against the custom-house officers who may have seized them, though the goods are *lodged in his majesty's stores and condemned as forfeited to the revenue*, and so are not converted *to the use of the defendant*, the officer.

However actions for injuries of this nature are more usually brought as actions of *trespass*, and have been already treated of in chapter the seventh. But it may be proper to add here to the cases there given.

Smith v. Reynolds. 2 Wils. 257. 1. That no custom-house officer has a right to seize contraband goods *on board a ship in port*, or before the goods are landed and exposed to sale.

*P. 340. *2. And by statute 19 *Geo.* 2. *c.* 34. § 16. It is enacted, "that if the judge certifies on the record, that there was "probable cause for such seizure, that in that case beside the "plaintiff's ship and goods so seized or the value of them, "he shall not be entitled to above two-pence damages, and "no costs."

Under which statute it has been held.

Sullivan v. Montague, Dougl. 102. 1st. That this certificate may be given at any time after the trial. 2d. That if a sentence which was in favour of the captor, is afterwards reversed in a superior court, and then the owner brings this action against the captor, a certificate from the judge of the superior court of appeal is good within the statute.

"But where *the taking has not been tortious*, there must be "some evidence of a *conversion.*"

Ross v. Johnson and Dawson. 5 Burr. 2825. As where trover was brought against a wharfinger to whom certain goods of the plaintiff had been delivered, and which he had not delivered to the owner. It was held that for goods stolen or lost out of the wharfinger's possession, this action would not lie; for to maintain trover an injurious conversion ought to be proved, and that *a bare non-delivery*, was not sufficient, as this might have been a *mere omission*, for which the remedy should be an *action on the case*, not trover, which supposes an actual wrong.

3. "It is not necessary to support this action that the own- "e

" er ſhould be abſolutely *deprived* *of *his goods*, by the con- *P. 341.
" verſion of him who has had poſſeſſion of them, for dama-
" ges are recoverable in this action for any *partial converſion*
" *or uſer* of the goods of another, by the owner after he has
" recovered poſſeſſion of them."

As where a carrier took part of the liquor out of a veſ- Richardſon
ſel which he was employed to carry and filled it up with wa- v. Atkinſon.
ter, it was adjudged to be a converſion of the whole, and 1 Stra. 576.
the plaintiff recovered accordingly.

So if a man takes my horſe and rides him, and afterwards Per
delivers him to me, yet I may maintain trover againſt him, Popham.
for the riding is a converſion, and the re-delivery will only Goldſb. 155.
go in mitigation of damages. 1 Danv. 21.

4. " Wherever the law has given *a lien* upon any goods
" or other things of value, there the retaining of them ſhall
" not ſubject the perſon to an action of trover.

1. This doctrine in favour of liens the courts of late years Per Lord
have much leaned to, for the convenience of trade, allowing Mansfield,
it, firſt, where there is an *expreſs contract to that effect*, and 4 Burr.
ſecondly, where it is *implied* either from the *uſage of the trade*, 2221.
or *the manner of dealing between the parties*.

As 1ſt. *A factor* has a lien upon goods conſigned to him Krutzer
not merely for what is due for thoſe goods, but for the *ba- v. Wilcox,
lance of a general account*, and for which he may retain them. 2 Burr. 936.
So he has a lien on the money in the hands of the buyer. Cowp. 251.

*And though in this caſe, goods had been conſigned to a *P. 342.
factor by a trader, and the factor knew that the trader was Foxcraft v.
in inſolvent circumſtances, but he nevertheleſs advanced Devonſhire
him money on the credit of the goods. It was adjudged, 2 Burr. 932.
that he was intitled to a lien againſt them, for the money he 1 Black.
had advanced, and ſhould hold them againſt the aſſignees of Rep. 193.
the conſignor.

2. " In the caſe of *manufacturers*, the lien which they
" have againſt the goods entruſted to them to manufacture,
" is not a general one, but confined *to the work done to the*
" *goods themſelves*, unleſs expreſs uſage of the trade is proved
" to the contrary."

As where the bankrupt was a flour factor, and had em- Ex parte
ployed the petitioner who was a miller, and he having al- Ockenden.
ways a large quantity of corn in his hands, and a great 1 Atk. 235.
number of ſacks, had, relying on theſe as a ſecurity, truſted
the bankrupt very largely, and when he became bankrupt,
he owed to the petitioner 286*l.* for grinding done before,
and 15*l.* for grinding corn then in hands, which corn and
the ſacks the petitioner inſiſted upon holding for his debt.
But Lord *Hardwicke* held, that as the petitioner had ſhewn
no general cuſtom for a lien, that it only depended on the
bailment, proceeding from a delivery of goods for a parti-
cular purpoſe, which could not be extended beyond the
work done to the goods themſelves.

So that a manufacturer who takes in goods for a particu- Green v.
lar Farmer.
4 Burr. 2214.

*P. 343. lar purpoſe (as to dye them) has a *lien on them, *for the work done to the goods themſelves*, but cannot retain them *for any other demand againſt the owner of the goods*, was held by the *court of king's bench* in this caſe.

"But the *uſage of trade*, will create a *general lien*."

Ex parte Deeze. 1 Atk. 237. & 228. Downman v. Mathews. Pre. Chanc. 580. S. P.

As where it was proved to be the uſage for *packers to* lend money to clothiers, and the clothes left to be packed, were conſidered *as a pledge*, not only for the packing, but for the *loan of the money likewiſe*, and here the bankrupt who was a clothier, borrowed money on a note of hand from the petitioner who was a packer, but *at a time when he had no dealings with him*, and the bankrupt having *afterwards* ſent him cloth to pack; it was held, that he might retain the cloth, for the debt, as well as for the price of packing.

3. "In the caſe of *pawns*. The pawning from the nature of the tranſaction creates of itſelf a lien."

Demainbray v. Metcalf. Prec. Chanc. 419. 2 Vern. 691. S. C. quot. 1 Atk. 236.

And where a teſtator had borrowed a ſum of money upon jewels, and afterwards borrowed three other ſeveral ſums, for each of which *he gave his note*, without taking any notice of the jewels: It was determined that the borrower's executors ſhould not redeem the money without paying the money due on the notes. For it muſt be preſumed, that the pawnee truſted to the pledge he had in his hands, by the money being lent ſubſequently to the pawning, which ex-

*P. 344. cluded the preſumption of *any truſt to the perſon: But if the loan had been prior to the pawning, there had been no lien.

"But though the act of pawning creates a lien in favour "of the pawnee, yet it cannot give him a greater intereſt "in the thing pawned, than the pawner himſelf had."

Hoare v. Parker. 2 Term Rep. 376.

Therefore where a *tenant for life of plate*, pawned it to a pawnbroker and died. It was adjudged, that though the pawnbroker had no notice of the pawnee's property, that he could have no lien on the plate as *againſt him in remainder*.

Ex parte Shank. 1 Atk. 234.

4. If *a perſon in England repairs a ſhip*, he has no lien againſt the body of the ſhip, for the repairs done to her; though for *repairs done beyond ſea*, the maſter may hypothecate the ſhip herſelf.

Wilkins v. Carmichael. Dougl. 97.

So neither has *the maſter* any lien on the ſhip for any money expended by him in repairs on her in *England*, or for money due for his own wages, for ſuch contracts are entirely perſonal.

Robinſon v. Walter. 3 Bulſt. 268. 1 Rolle's Rep. 449.

5. *An innkeeper* hath by law a right to detain an horſe left with him till he is paid for his keeping. For as he is by law compellable to receive a gueſt and his horſe, ſo he ſhall have this remedy. And though in this caſe the horſe had been brought to the inn by a ſtranger, without the owner's knowledge, and was afterwards claimed by the owner, yet it was held, that the innkeeper might notwithſtanding keep

* keep the horſe till paid; for ſo by pretended ignorance that his horſe was ſent to an inn, might the owner defraud the innkeeper, by getting his keeping for nothing. *P. 345.

So that to give this right of retainer it is not therefore neceſſary that the *owner ſhould be a gueſt*, for merely leaving his horſe at an inn gives this right of retainer till paid for his keeping to the innkeeper. York v. Grindſtone, Salk. 388.

But this power of retaining is only *while the horſe remains in the innkeeper's poſſeſſion*, for if he ſuffers the horſe to be taken away, and the horſe is brought again to his inn, he cannot retain him for the former demand. Jones v. Pearle, 1 Stra. 557. Warbrook v. Griffin, 2 Brownl. 254.

† So the innkeeper cannot *ſell* the horſe except in *London*, where by the cuſtom he may ſell the horſe for his keeping; and therefore in this caſe where a carrier had been in debt to an innkeeper at *Glaſtenbury* for the keeping of his horſes, and he ſeized and ſold three of the carrier's horſes, the carrier recovered in this action. † Same caſe.

So by the cuſtoms of *London* and *Exeter*, if an horſe at an inn eats out the price of his head, the innkeeper may have a reaſonable appraiſement of his value made by four of his neighbours, and *take him as his own* according to that valuation, for his debt. Moſs v. Townſend, quot. 3 Bulſt. 271.

6. So a *carrier* may detain goods entruſted to him to carry till he is paid for their carriage. Skinner v. Upſhaw, 2 Lord Raym. 752.

* 7. "*An attorney* has a lien againſt the papers, &c. of "his client, and may retain them till paid his bill of "coſts." *P. 346.

But where a *clerk in court* advanced money to a ſolicitor to carry on a cauſe, it was adjudged, That *he* could not detain the client's papers as a pledge for the money advanced by him to the ſolicitor, but ſhould have recourſe to the ſolicitor himſelf. Grey v. Cockerell, 2 Atk. 114.

"But this right of lien being admitted for the benefit of "trade, it ſhall be confined in its operation *to that only*."

Therefore where the owner of five cows put them to paſture with defendant, and agreed to pay him 12*d. per* week for each cow, and afterwards the owner ſold them to the plaintiff, it was adjudged, that defendant could not juſtify the detaining them *for their keeping*, but was put to his action againſt the firſt owner. Chapman v. Allen, Cro. Car. 271.

So if an horſe be diſtrained to compel an appearance in the hundred court, after an appearance, the perſon who took the horſe cannot juſtify the detaining him till *paid for his keeping*. Linton v. Cook, H. 9 Geo. 2. Bull. N. P. 45.

So where *A.* purchaſed an intereſt in a leaſe, and the writings were left in the hands of an attorney to draw an aſſignment, which he did, and it was executed. It was held that he could not refuſe to deliver it up to *A.* till paid for it. Anon. 1 Lord Raym. 738.

So

*P. 347. * So where the defendant paid the duty at the cuſtom-
Stone v. Lingwood, 1 Stra. 651. houſe for a parcel of goods, the property of the plaintiff, which had come home in the ſame ſhip with others of the defendant's, it was held that he ſhould not retain the goods till paid what he had advanced for the duty, for he might have his action for the money.

Binſtead v. Buck, 2 Blackſt. Rep. 1117. So where in trover for a dog, the defendant juſtified the detaining him, on the ground that the dog had ſtrayed caſually to his houſe, where he had kept him 20 weeks, and demanded the expence of his keeping, on a caſe made, whether the refuſal amounted to a converſion, the defendant's counſel declined to argue it, ſo the *poſtea* was ordered to the plaintiff.

Bermin v. Currant, Trin. 28 Geo. 2. Bull. N. P. 45. And in general, no perſon can in any caſe retain where there is *a ſpecial agreement to pay*, for then the other party is perſonally liable.

† Mead v. Hammond, 1 Stra. 505. † 5. Trover will lie againſt the maſter for *goods which were delivered to the ſervant.*

‡ Jones v. Hart, Salk. 441. 1 Lord Raym. 738. S. C. ‡ But in ſuch caſe, it is not ſufficient that the goods were delivered to the ſervant, unleſs it appears that the goods *came to the hands of the maſter*, or unleſs *the ſervant was uſually employed by the maſter to receive the goods in the way of the maſter's trade:* As in this caſe, which was of a pawn delivered to a pawnbroker's ſervant, and which being loſt, the pawner recovered in trover againſt the maſter.

Perkins v. Smith, 1 Wilſ. 328. So trover will lie againſt the *ſervant himſelf* for diſpoſing of the goods of another perſon * though to his maſter's uſe, and that whether he has authority from his maſter to do ſo or not.

*P. 348. Brown v. Hedges, Salk. 290, 2 Ref. 6. One *tenant in common, jointtenant or parcener* cannot have trover againſt his companion, for the poſſeſſion of one is the poſſeſſion of all.

§ Holliday v. Camſell, Eaſt. 27 Geo. 3. 1 Term Rep. 658. § Therefore where the plaintiff was a member of an amicable ſociety, and kept the box containing the ſubſcription, which defendant who was alſo a member took away, it was held that they were tenants in common of the box, and ſo that one could not maintain trover againſt the other.

" But this is only in caſes where the property is equal, ſo
" that the poſſeſſion of the one is the poſſeſſion of the other."

Weſt v. Paſmore, at Exon. per Turton Juſt. Bull. N. P. 35. For where there were two tenants in common of lands, the *one in fee*, the *other for years*, and the tenant for years cut and converted to his own uſe trees which had been growing on the land, it was held that the other might have trover for them, for they belonged *entirely to the inheritance.*

Co. Littl. 200. a. " So if one tenant in common *deſtroys* the thing held in
" common, the other may have trover againſt him for it
" for that is a *total* converſion to his own uſe of what he
" had only a part."

Barnardiſton v. Chapman & Smith, As where one part owner of a ſhip took her and ſent her on a voyage to the *Weſt Indies*, where ſhe was loſt, and the other

other owners bringing * an action for it, Lord *King* left it to the jury, whether, they being tenants in common of the ſhip, this was not *a deſtruction* by the defendant, and the jury found accordingly. Hil. 1 Geo. 1. Bull. N. P. 34. *P. 349.

But otherwiſe, in the caſe of *partners in trade*, each has a power ſingly to diſpoſe of the whole partnerſhip effects, and even if one of the partners becomes a bankrupt, yet every act of the ſolvent partner without knowledge of the act of bankruptcy, as in making conſignments or ſales of goods, &c if done *bona fide* and without fraud is good, ſo that the aſſignees of the bankrupt partners cannot recover by this action the goods ſo diſpoſed of by the other, neither if the ſolvent partner afterwards fails, can the aſſignees under the joint commiſſion againſt both, maintain trover againſt the *bona fide* vendee or conſignee of the partnerſhip effects. Fox v. Hanbury, Cowp. 445.

7. Trover will not lie againſt *executors or adminiſtrators*, for a trover and converſion of goods by their teſtators or inteſtates; for it is founded on a tort, and actions founded on torts by the teſtator or inteſtate cannot lie againſt executors or adminiſtrators. Hambly v. Trott, Cowp. 375.

8. Trover will lie againſt *baron and feme*, whenever the converſion has been by the wife before coverture or by herſelf after coverture, for it being a tort by her, ſhe ſhall be joined with her huſband in the action. Marſh's caſe, 1 Leon. 312. Owen. 48. Draper v. Fulkes, Yelv. 165. Sir W. Jones, 143.

*3. OF THE PLEADINGS AND EVIDENCE IN THIS ACTION.

And firſt of the PLEADINGS *on the Part of the* PLAINTIFF. *P. 350.

1. In trover *the converſion is the giſt of the action*, and the manner in which the goods come to the defendant's hands is but inducement; the plaintiff may therefore declare upon *devenerunt ad manus* generally, or ſpecially *per inventionem*, (even though in fact the defendant came to them by delivery,) or that the defendant fraudulently obtained them, (as by winning them at cards from the plaintiff's wife) and this being inducement need not be proved: but it is ſufficient to prove property in the plaintiff, the poſſeſſion of and converſion by the defendant. 1 Dan v. Abr. 23. Bull. N. P. 33.

2. It was formerly uſual to tie up the plaintiff to great ſtrictneſs in ſpecifying in the declaration the nature, quality and quantity of the goods, for which the action is brought, and numberleſs cafes in the old books of arreſts of judgment in trover turn upon that objection. But greater latitude is now allowed: as a declaration, *for one parcel of packcloth*, without ſetting out the exact quantity, has been held to be good: ſo *for fifty pieces of ſquare timber*. Bottomley v. Harriſon, 2 Stra. 809.

Therefore in trover for a *debenture* againſt defendant, in whoſe poſſeſſion it was, plaintiff need not ſet out *the number* of it, nor in trover for a *bond* need he ſet out the *date*, for being Per Holt at G. Hall, 1707. Bull. N. P. 37.

*P. 351. Wilson v. Chambers, Cro. Car. 262.

being * out of possession he may not know the exact number or date: but if he does in his declaration set out the number or date, he must prove it exactly as laid and the sum to a farthing, or he shall be non-suited.

1 Brownl. 8. 1 Vent. 135.

3. "The declaration in trover should state *the time* of the "conversion, and for want of alledging it, judgment was "in this case arrested."

Tesmond v. Johnson, Cro. Jac. 428.

But where the plaintiff in his declaration under a *scil.* laid the conversion on *a day before the trover*, and this was alledged in arrest of judgment, the court held nevertheless, that the *postea convertit* was sufficient, and the *scil.* being inconsistent to be void.

Hubbard's case, Cro. Eliz. 78. Goldsf. 54. 89. Anon. Clayt. 131.

4. So the declaration should state *a place* where the conversion was made, or the declaration will be ill in substance, for want of a venue.

But the want of a place is aided if defendant pleads a special plea, as a sale in market overt, *viz.* at *S.* in *Com. Nott.* For then a *venue is laid in the plea:* but where the plea is so, the proof of a sale in another place in market overt will not support the declaration.

Brown v. Hedges, Salk. 290. 1 Ref.

But though a time and place of conversion must be alledged *in the declaration*, yet the action being transitory, the conversion may be laid here and proved in *Ireland.*

*P. 352. Godwin v. Harwood, 2 Roll. Rep.

* 5. The declaration in trover need not alledge *the value of the goods*, aliter in detinue, where the goods themselves are to be recovered or the value of them.

‡ Nelthorp & Ux. v. Anderson, Salk. 114.

‡ 6. In trover by *baron and feme*, it is bad to declare that the defendant converted the goods *ad damnum ipsorum*, for the possession of the wife is the possession of the husband, and so is the property, the conversion therefore cannot be to the damage of the wife, but of the husband only.

Berry v. Nevis, Cro. Jac. 661.

So for the same reasons, in trover *against* baron and feme the conversion must be laid *to the use of the husband* and not *to her or their use.*

† Eliz. Countess of Rutland, v. Isab. Countess of Rutland, Cro. Eliz. 377. 2 Ref.

† 7. In declaring in this action by *an executor*, the declaration should state the time of the conversion, whether in his own time or in that of his testator.

‡ So, as an executor is possessed of his testator's goods *ut de bonis propriis*, he may declare for them in that manner and yet that the conversion of them was *in retardationem executionis testamenti.*

‡ Rivers v. Godskirt, Cro Eliz. 568. § Lacy v. Smith, Cro. Eliz. 102.

§ 8. In trover by *an administrator*, he may declare generally that administration was granted to him by *A. B.* official of the bishop of ———, without saying that he was ordinary of the place, or had the right of granting administrations.

† Hudson v. Hudson, Latch. 214.

† So an administrator may declare that he was possessed of divers goods and chattels as of * his own proper goods and though they were the testator's in fact, yet the declaration is good.

*P. 353.

In trover by an adminiſtrator for rum *taken and converted in the life-time of the inteſtate*: upon evidence it appeared, that the rum had been taken in the teſtator's life-time, but *converted after his death*; and this evidence was held to maintain the declaration, for the time of uſing the rum lay in the breaſt of the defendant, who ought to have diſcloſed it by his plea, and the taking in the inteſtate's life-time, and keeping it till his death was ſufficient to maintain the declaration. Croſier v. Ogleby, 1 Stra. 60.

I. *Of the* EVIDENCE *on the Part of the* PLAINTIFF.

1. "As this action equally lies where the *taking has been* "*tortious*, or where the defendant has *lawfully obtained poſ-* "*ſeſſion of the plaintiff's goods and afterwards converted them*; "what ſhall be evidence of a converſion, ſeems in theſe two "caſes to be different."

For where an *actual taking of the goods in queſtion* is given in evidence, that is ſufficient *without ſhewing a demand and refuſal*, for it is an actual converſion: but when defendant comes to the goods *by finding, delivery, or bailment* for example, there an actual demand and refuſal muſt be ſhewn in order to eſtabliſh a converſion, unleſs an actual converſion can be proved, * in which caſe it is not neceſſary to prove a demand. Bruen v. Roe, Sid. 264. Beckwith v. Elvey, Clayt. 112. *P. 354.

For a demand and refuſal in ſuch caſe is ſufficient *evidence of a converſion*. Eaſon v. Newman, Cro. Eliz. 495.

†But it is not of itſelf a converſion, for if the jury find only a ſpecial verdict, *viz.* that there was a demand and refuſal, and the court cannot adjudge it a converſion. †3 Burr. 1423.

"For a refuſal on demand may be juſtifiable and lawful "under particular circumſtances."

As if a perſon finds my goods, and I demand them, and he anſwers, that he knows not whether I am the true owner or not, and therefore refuſes to deliver them, this is not to be deemed a converſion to his own uſe, as *he keeps them for the owner*. Per Coke, Ch. Juſt. 2 Bulſt. 312.

"So where the perſon has *a lien* in the caſes before men- "tioned, he may lawfully refuſe to deliver the things when "demanded, till ſatisfied to the amount of his lien."

As if an innkeeper refuſes to deliver an horſe ſtanding at his inn till paid for his keeping. 2 Show. 161.

Or a carrier to deliver goods till paid for the carriage; theſe refuſals being lawful, cannot amount to a converſion. 2 Lord Raym. 752.

"But a demand and refuſal is only preſumptive evidence "of a [illegible], for if it appears that there has been no con- "verſion in fact, this action will not lie."

*P. 355. Anon. Salk. 655. Ld. Raym. 752. 5 Burr. 2827.

*As in trover against a carrier for goods, *which appear to have been either loſt or ſtolen*, in ſuch caſe denial is no evidence to ſupport the converſion neceſſary in this action, ſince the contrary is proved, though the carrier would be liable under the cuſtom of the realm, but if this did not appear, or if the carrier had the goods in his cuſtody when demanded, it had been good evidence of a converſion. *Vide Roſs* v. *Johnſon*, *ante* 340.

2 Mod 245.

So if defendant had cut down plaintiff's trees and left them on the ground, this could not ſupport a converſion, ſince it is plain that they were left in the plaintiff's poſſeſſion.

Rookeby's caſe, Clayt. 122.

2. A demand *of ſatisfaction* for goods taken and a refuſal, was in this caſe adjudged to be ſufficient evidence of a converſion, though there was no demand of the goods themſelves.

Blackham's caſe, Salk. 290.

3. If the plaintiff proves the goods to have been in his poſſeſſion, it is *primâ facie* evidence of property, but the defendant may prove them to be the goods of *J. S.* who died inteſtate, and that letters of adminiſtration have been granted to him: but ſuch evidence will not be concluſive againſt the plaintiff, for he may ſhew, that he was married to *J. S.* and ſo entitled.

4 Inſt. 154. *P. 356.

4. In trover by a ſtranger for *goods taken at ſea*, he muſt ſhew in order to ſupport this action, beſides a property in himſelf, firſt that his ſovereign was in amity with the king of *England*; ſecondly, that his ſovereign was in amity *with the ſovereign of defendant, for if there was a war between them, then the capture would be legal.

5. As to the evidence in actions under commiſſions of bankrupt, it has been decided:

Ewens v. Gould, per Hardwicke, Ch. Juſt. Hil. 8 Geo. 2. Bull. N. P. 40.

1. That a man cannot be a witneſs to prove an act of bankruptcy committed by himſelf, but his confeſſion to a third perſon that he went out of the way to prevent being arreſted, or to ſuch like facts as are acts of bankruptcy, is admiſſible evidence.

† So no releaſe can make the *bankrupt's wife* a witneſs to prove an act of bankruptcy committed by the huſband.

†Field v. Curtis, 2 Stra. 829.

2. "In actions to recover any part of the bankrupt's pro-"perty *a creditor* is clearly from intereſt an incompetent "witneſs."

Granger v. Furlong, 2 Black. Rep. 1273.

But where on a motion for a new trial, on the ground that a creditor who had proved a debt under the commiſſion had been admitted to prove the debt of the petitioning creditor at the trial, it appeared that he had *ſold his chance of recovering his debt* to another perſon for leſs than five ſhillings in the pound, and had releaſed the aſſignees, and ſo in fact had no intereſt, he was held to be a competent witneſs to ſupport the commiſſion.

*3. *Of the* PLEADINGS *on the Part of the* DEFENDANT. *P. 357.

1. It is ſaid by Juſtice *Twiſden* in this caſe, that there is no plea in trover but the general iſſue and the ſpecial one of a releaſe, for every plea in juſtification is tantamount. Devoe v. Dr. Coridon, 1 Keb. 305.

But however numberleſs ſpecial pleas allowed appear in the books; and Lord Ch. Juſt. *Holt*, in *Salk.* 654, allows this one following to be of that deſcription, though he ſays that it is the only good ſpecial plea in the books, *viz.*

To trover for two pipes of wine, defendant pleaded, that ſo much is due to the king out of every twenty pipes of wine imported *for priſage*, and for which he took the wine in queſtion; this plea was held to be good. Kenicot v. Bogan, Yelv. 198.

But other ſpecial pleas have been allowed.

As where defendant pleaded, that the plaintiff had had a *judgment in treſpaſs* againſt him *for taking the ſame goods*: it was ruled to be a good plea. Lechmere v. Toplady, Show. 146.

So a recovery in trover for the ſame goods againſt *J. S.* was held to be a good plea. So if the trover had been againſt the defendant. Brown v. Wooton, Cro. Jac. 73.

For where there is a recovery in trover, as plaintiff is ſuppoſed to get damages to the value of the goods, they then become *the property* * *of the defendant*, ſo that the plaintiff in neither caſe has a property in the goods. Adams v. Broughton, 2 Stra. 1078. *P. 358.

"So that it ſeems that all theſe caſes of juſtification may "be given in evidence under the general iſſue."

As where in trover for taking a gun, the defendant pleaded the general iſſue, and gave in evidence, that he was game-keeper of the manor of *B.* and took the gun under ſtat. 22 & 23. *Car.* 2. it was held to be well; though as the act does not authorize the pleading the general iſſue, it would be otherwiſe in treſpaſs. Dane v. Walter, in Kent, 1682. Bull. N. P. 48.

It will however be proper to mention ſome caſes of good juſtifications in this action, ſo as to enable defendants to avail themſelves of them for their defence, whether in the form of a plea or as evidence under the general iſſue.

As where defendant to an action of trover for ten loads of timber pleaded, "That he was tenant to the plaintiff, and had erected a barn on the premiſes, and put it upon blocks and timbers lying upon the ground, but not fixed in it, and which it was the cuſtom of the country ſo to fix, and carry away at the end of the leſſee's term," it was held to be a good juſtification, and defendant had a verdict. Culling v. Tuffnall, per Treby, C. J. at Hereford, 1694. Bull. N. P. 34.

So things fixed to the freehold, and *ſet up by the leſſee for the convenience of trade*, (as vats, coppers, tables, *&c.*) may during the term be removed by the leſſee, and are liable to Poole's caſe, Salk. 368.

*P. 359. be ſeized * and ſold by the ſheriff under a *fieri facias*, iſſued againſt the leſſee who erected them.

Bull. N. P. 34. For though the general rule of law is, that things fixed to the freehold cannot be removed, yet this has of late years admitted many exceptions, and many things are now allowed to be carried away, which could not formerly; as marble chimney-pieces, &c. and ſtill more, fixtures for the benefit of trade, as brewing veſſels, cyder mills and ſuch like: this is as between landlord and tenant, and tenant for life, or in tail and the reverſioner, but the rule ſtill holds as between heir and executor.

Harvey v. Harvey, 1 Stra. 1142. But in this caſe, which was trover by the executor againſt the heir, the Chief Juſtice held, that *hangings, tapeſtry, and iron backs to chimnies*, belonged to the executor; who recovered accordingly.

Palmer v. Woolley, Cro. Eliz. 454. 3 Co. 83. S. C. 2. In trover for goods, defendant juſtified, "That by preſcription, every ſhop in *London* ſhould be a market overt for all wares ſold there, and that the goods were ſo bought there;" it was adjudged, that the cuſtom was too general and unreaſonable; for, a ſale is only good as in market overt, *where a thing is bought which appertains to the trade of that ſhop*, as plate at a ſilverſmith's, &c. but not if bought in a back ſhop, or place not open, or in a ſhop whoſe trade is in goods or wares of a different nature from thoſe ſold.

*P. 360. Thompſon v. Clark, Cro. Eliz. 504. 3. In trover for goods and converſion of them at *D. in Com. Nottingham*, defendant * juſtified "that he recovered againſt the plaintiff a debt of 20*l.* by bill in *K. B.* and had thereupon a *fi. fa.* directed to the ſheriff of the county of *York*, who at *Wakefield* in that county *ſeized and delivered to him the goods in queſtion*," and ſo juſtified the converſion; on demurrer the plea was held to be ill, becauſe the ſheriff *cannot deliver the defendant's goods in execution to the plaintiff*, in ſatisfaction of his debt.

Gomerſal v. Wyatt, Cro. Jac. 255. 4. The defendant in this caſe juſtified the taking of the goods as bailiff of the king for *a diſtreſs upon a plaint in curia manerii and ſelling them*; this on demurrer was held to be bad, for the goods taken upon a *diſtringas* ſhould not be ſold, eſpecially in a court baron, though it were the king's.

5. "Therefore a plea in juſtification ſhould always ſhew "a *complete title*."

Davies's Cro. Eliz. 611. Foxley's caſe, 4 Co. 109. As where the plea was a juſtification of the taking, as *Waif*; it was held that the plea ſhould ſtate that a felony was committed, and that the goods were waived by the thief, or it is bad.—*Brownlow* v. *Lambert*, *Cro. Eliz.* 716. *S. P.*

Agars v. Liſle, Hutt. 10. So the plea in juſtification ſhould either *traverſe the converſion, or confeſs and avoid it*. For the converſion is the giſt of the action, and it is not therefore ſufficient to juſtify *the taking only*.

2. Another plea in this action is *the ſtatute of limitations*. As to which it is enacted, "That actions of trover muſt be

" be commenced * within *six years* after the cause of action *P. 361.
" accrued; by stat. 21 *Jac.* 1. *c.* 16."

1. " This statute begins to run from *the time of the con-
" *version*, for then the cause of action accrues."

For where an executor left furniture of the testator's in the house by consent of the heir, who used it, and afterwards refused to deliver it to the executor when demanded, the executor brought trover for it, and the heir pleaded the statute of limitations; but *per cur.* the user by consent and before demand, was no conversion, and the *refusal, which is the only evidence of it, being within six years*, the action is not barred. Wortley Montague v. Lord Sandwich, Farresley 99.

2. Where to a plea of the statute of limitations, the plaintiff replies, that the action was commenced before the six years expired, he ought to set out, *the day when the writ was sued out*; it is not sufficient to say that he sued it out generally in *Easter* term or so. Coles v. Sibsye. Style, 178.

And by no fiction of law of reference to the first day of term, shall the plaintiff be barred of his action, but he shall always be at liberty to aver the true time of suing out the writ. Morris v. Harwood & Pugh, 3 Burr. 1243.

3. If one jointtenant brings trover against a stranger without joining his companion, the defendant should plead it in abatement, and cannot take advantage of it on the general issue. 2 *Lev.* 113. *Cro. Eliz.* 544. Brown v. Hedges, Salk. 290. 3 Ref.

*4. In trover by a rightful administrator against an executor *de son tort*, defendant cannot give in evidence payment of debts, to the value of goods which are still in his hands, but only for such as he had sold. *Ante, Anon.* 336. 1 *Vent.* 349. *P. 362. Chesshold v. Messenger, per Parker, Ch. Bar. at Glouceſter, 1747.

† If an administrator brings trover on his own possession, defendant may give in evidence on the general issue a will and an executor; but if the action be brought on the possession of the intestate, the defendant must plead it in abatement, and cannot give it in evidence on the general issue. Bull. N. P. 48. † Blainfield v. March, Salk. 285.

5. In some cases the defendant is allowed to *bring the things for which the action is brought into court*.

As in the case of *trover for money*, the court gave leave to bring the money declared for into court; but the court said they would do it in this case only, and *not in trover for goods*. Anon. Stra. 142.

And so it was in this case denied, which was *trover for goods*, which are cumbrous and require room; but the court granted a rule to shew cause why on delivery of the goods to the plaintiff and paying of costs the proceedings should not be stayed. Cook v. Holgate, 2 Barnes, 284.

And where the *goods* are of an ascertained value, and there is no tort to encrease the damages, they may be brought into court. Fisher v. Prince. 3 Burr. 1364. Whitten v. Fuller. 2 Black. Rep. 902.

And

*P. 363. * And note, that defendant in this action may be held to special bail on an affidavit that the goods converted amount to above 10*l.*

Catlin v. Catlin, 1 Wilf. 23.

4. OF THE DAMAGES AND COSTS.

1. *Of the Damages.*

Olivant v. Berino. 1 Wilf. 23.

" The judgment in trover can only be for *damages*. For " the court will not make an order that the plaintiff ſhall " *take back his goods again, for which the action is brought and* " *coſts*, and diſcontinue his action, for the action is not for the " goods, but for damages for the taking and converſion."

Knight v. Bourne, Cro. Eliz. 116.

So where in trover for an horſe the judgment was, that the plaintiff ſhould recover either the horſe or damages, judgment was reverſed.

Rivers v. Godſkirt. Cro. Eliz. 568. 3 Ref.

And the jury cannot aſſeſs damages and coſts *together*, to more than the damages laid in the declaration, but they may aſſeſs the damages to that amount, and the coſts beyond it to any amount.

2. *Of the Coſts.*

Marriner v. Barret. Paſch. 1 Geo. 2. quot. 3 Burr. 1284.

The ſtatute 8 & 9 *W.* 3. *c.* 11. which gives coſts to one defendant who has been acquitted, where there are ſeveral (*vid. ante, chap.* of treſpaſs,) does not extend to trover.

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*P. 364.

* CHAPTER XIII.

THE ACTION OF TRESPASS ON THE CASE.

TRESPASS on the caſe, is an action brought for the recovery of damages, for acts *unaccompanied with force*, and which *in their conſequences only* are injurious. For though an act may be in itſelf lawful, yet if in its effects or conſequences, it is productive of any injury to another, it ſubjects the party to this action.

Reynolds v. Clarke. 1 Stra. 334.

As where defendant put up a ſpout in his own concerns, this was an act lawful in itſelf, but when it produced an injury to the plaintiff, by conveying the water into his yard, treſpaſs on the caſe was adjudged to lie for ſuch conſequential injury.

Hickeringall's Caſe. Hil. 5 Ann.

So ſhooting of a gun, which in itſelf is an indifferent and lawful act, yet when by it the plaintiff's decoy was injured; this action was held to lie.

*P. 365. In treating of this action, I ſhall firſt conſider the general nature and deſcription of the action. * 2d. The particular injuries

injuries for which it lies. 3d. The pleadings and evidence. And 4th. The verdict, judgment, *&c.*

And 1st. OF THE GENERAL NATURE OF THIS ACTION.

1. " It is not neceſſary to maintain this action, that the " injury which the plaintiff has ſuſtained has ariſen *from* " *ſome act* of the defendant, for the action equally lies where " the injury has been cauſed *by the neglect* or *culpable omiſſion* " of any duty it was incumbent on the defendant to per- " form."

As if one retains an attorney to conduct his ſuit, and in conſequence of any neglect the party ſuffers any loſs, this action lies againſt the attorney for ſuch neglect. Finch's Law 188.

So if a perſon ſuffers the ditch which borders his neighbour's land to become ſo foul, that the water will not run, whereby his neighbour's land is overflowed, this action lies for ſuch culpable omiſſion of what he was bound by law to do. Hale on F. N. B. 427.

" But in order to charge a perſon in this action for any " neglect, the law muſt have *impoſed a duty* on him, ſo as to " make that neglect culpable."

As if a perſon *finds* any thing, he is under no obligation by law to keep it ſafely, and if it therefore is ſpoiled while in his poſſeſſion; * yet no action lies. For there was no duty by law on him to apply any degree of care. Mulgrave v. Ogden. Cro. Eliz. 219. *P. 366.

2. " It is no excuſe for a defendant in this action, that " the injury was *involuntary* on his part. For if any damage " is cauſed to another, *from the folly* or *want of due care and* " *caution* in ſuch defendant, this action lies."

As if a perſon brings an unruly horſe to break in a place of public reſort, though he might not intend to do an injury to any perſon, yet if any one is kicked or otherwiſe hurt by the horſe, he ſhall have this action: for it was folly and want of care to bring him to ſuch a place for ſuch a purpoſe. Michael v. Aleſtree. 2 Lev. 172.

" So neither is it any excuſe, that by proper attention the " perſon who receives the injury, might have avoided it."

As if a perſon lays logs of wood acroſs the highway, through which by proper care a perſon might ride with ſafety, yet if the horſe ſtumbles over them and the perſon be thrown, he may recover in this action for the injury. Fowler v. Saunders. Cro. Jac. 446.

3. " But if the injury which the party has ſuſtained has " ariſen from *his own neglect and folly*, and ſo might have " been avoided; this action will not lie."

As where plaintiff declared, that he was employed by the defendant, to carry a load of timber from *Woodbridge* to *Ipſwich*, to be laid * down where the defendant ſhould appoint, and that he carried it, when defendant having appointed Virtue v. Bird. 2 Lev. 196. *P. 367.

no

no place where it was to have been laid down, that plaintiff's horſes where detained in the cold, by which ſome of them died, and the reſt were ſpoiled: after a verdict for the plaintiff, judgment was arreſted: for it was the plaintiff's own fault that he did not take out his horſes and lead them about, or he might have unloaded the timber in any proper place and have returned.

Co. Litt.

4. "Wherever a right is of a public nature, that is, is "common to all the king's ſubjects, the mere depriving the "public of that right, will not ſubject the party to an ac- "tion, for ſo would actions be without end, the remedy is "by information or indictment. But if any individual ſuf- "fers a particular injury in conſequence of being deprived "of ſuch right, he may have his action on the caſe."

Payne v. Partridge. 1 Salk. 12.

As where plaintiff brought this action againſt the defendant, as owner of a *common ferry*, to which by preſcription the plaintiff as an inhabitant of *Littleport*, had a right to paſs *toll free, and* the action was for refuſing to ferry him over: it was held not to lie, for the right of being ferried over is common to all the king's ſubjects, and for being deprived of that, no remedy lies *without ſpecial damage*, which here the plaintiff has not laid. But he might have had his action for *taking toll* from him, he having a particular exemption. But on that he did not declare.

*P. 368.

* "So where the matter is of a public nature, though "confined to a certain body, this action will not lie."

Williams's Caſe. 5 Co. 72. b.

As where plaintiff declared, that in a certain chapel of eaſe within the manor of *Wollaſton*, the defendant was bound as vicar of *Alderbury*, to celebrate divine ſervice and adminiſter the ſacrament to the plaintiff, and his tenants and ſervants within the ſaid manor, and the action was for the not ſo celebrating divine ſervice in ſuch chapel of eaſe. After a verdict for the plaintiff, judgment was arreſted. For the chapel being public and common to all the tenants of the manor, then every tenant might have this action, which cannot be. But the remedy muſt be in the ſpiritual court.

Anon. 1 Ld. Raym. 739. 2 Salk. 441. S. C.

5. "It is to be obſerved on this action, that any perſon "employing another in any office or employment, is an- "ſwerable for his miſconduct or neglect, or for any injury "which he may occaſion. Therefore a maſter ſhall anſwer "for the miſconduct of his ſervant."

Jarvis v. Hayes. 2 Stra. 1004.

As where an action was brought againſt the maſter, for his ſervant with his cart having run againſt the cart of the plaintiff in which was a pipe of wine, which was overturned and ſpilt, the plaintiff recovered.

Theſe caſes ſhew the general nature and deſcription of this action. I ſhall now conſider,

2dly,

*2dly, THE PARTICULAR INJURIES FOR WHICH THIS ACTION LIES. *P. 369.

These are divisible into injuries.

1. *To the Person.*
2. *To personal Property.*
3. *To real Property or Chattels real.*
4. *To personal Rights, not properly reducible to any particular Head.*

Of each of which in their Order.

1. OF INJURIES TO THE PERSON.

1. If a person *undertakes the cure of any wound or disease, and by neglect or ignorance, the party is not cured or suffers materially in his health*, he may recover damages in this action. But the person must be a *common surgeon*, or one *who makes public profession of such business* as surgeon, apothecary, &c. for otherwise it was plaintiff's own folly to trust to an unskilful person, unless such person expressly undertook the cure. 1 Danv. 77. Dr. Groenvelt's Case, 1 Lord Raym. 214.

"And it seems that any deviation from the established "mode of practice, shall be deemed sufficient to charge the "surgeon, &c. in case of any injury arising to the patient."

For upon this ground an action was adjudged to lie against the surgeon and apothecary, for breaking the callous of the plaintiff's leg, after it had been set. It appearing that it was done unskilfully, and out of the common course of practice, and for the sake of making an experiment with a new instrument. Slater v. Baker and Stapleton, 2 Wilf. 359.

*2. "If the *health of any person is impaired in consequence "of the act of another*, as selling him bad wine, which in- "jures the party's health, this action will lie. So for exer- "cising a noisome trade in the neighbourhood, which pro- "duces the same bad effects." *P. 370. 1 Roll. Ab. 90.

As where the action was brought for erecting a brewhouse and burning sea coal, by which the air was infected. So for erecting a tallow-furnace, to the annoyance by the smell of the plaintiff's house and family, and loss of business in consequence. In these cases the plaintiff had redress by action on the case. Jones v. Powell, Hutt. 135. Morley v. Pragnell, Cro. Car. 510.

3. "If any person keeps a dog *which is used to bite*, this "action will lie against the owner, at the suit of any person "whom the dog has bitten."

But the *owner must have notice* that the dog was used to bite. For though if a man keeps animals *feræ naturæ*, as lions or bears at large, without proper care, he is answerable for any mischief they do, though without notice, yet dogs being *mansuetæ naturæ*, the owner must have notice of their viciousness, or he will not be liable. And it is therefore matter of substance to set out the notice in the declaration. Therefore Mason v. Keeling, 1 Lord Raym. 606. Buxenden v. Sharp, 2 Salk. 662.

Smith v. Pelah, 2 Stra. 1264.

Therefore where a dog had once bitten a man, and the owner ſtill let him go at large, though he had notice of the dog's having bitten the perſon, and he afterwards bit another * perſon, this action was adjudged to lie againſt the owner of the dog, though it appeared that the perſon who had received the injury had trod on the dog's toes, for the owner ſhould have hanged him on the firſt notice, and the king's ſubjects are not to be endangered.

*P. 371.

Bolton v. Banks, Cro Car. 254.

2. So an action will lie againſt the owner of a dog uſed to bite ſheep, for killing any, after notice to the maſter.

§Kinnion v. Davis, Cro. Car. 487.

§ And it is ſufficient to ſupport the *ſcienter* in this action, that the dog had once done ſo before.

‡Jenkins v. Turner, 1 Lord Raym. 118.

‡And if one has a dog uſed to bite ſheep, and he bites an horſe, it is actionable; for the owner after notice of the firſt miſchief done, ſhould have deſtroyed the dog, to prevent further injury.

But theſe latter caſes more properly belong to the head of injuries to perſonal property.

2. OF INJURIES TO PERSONAL PROPERTY.

Under this head I ſhall conſider: 1. Such injuries as ariſe to perſonal property, from the miſconduct or negligence of officers. 2d. Of private perſons.

Under the claſs of officers, I include, 1. Sheriffs, and their inferior officers. 2. Attornies. 3. Juſtices of the peace.

*P. 372.

* And firſt of *Sheriffs*, or their inferior officers.

Under this head 'tis previouſly to be obſerved.

1. "That as the office of ſheriff partakes of a *judicial* as "well as a *miniſterial* function, wherever the ſheriff is acting "in his *judicial capacity*, no action will lie for any miſcon- "duct in it, where no fraud or corruption appears."

Metcalfe v. Hodgſon & al. Hutt. 120.

As where plaintiff declared againſt the defendants as ſheriffs of *York*, that time out of mind there had been a court of record held before the ſheriffs, where actions of debt had uſed to be brought, and the defendants in ſuch actions arreſted, and held to bail by the ſaid ſheriffs, and that the ſheriffs were alſo from time immemorial keepers of the gaol. And the action was againſt the ſheriffs for taking inſufficient bail. The court held, that the two authorities concurring they would hold the act to be done by them *as judges*, and that the action would not lie.

Watſon v. Benniſon & Elſwick, Cro. Eliz. 625.

2. If there are two ſheriffs, and an action is brought againſt them for any miſconduct in their office, and one of them dies before the trial; yet ſhall the action ſurvive againſt the other as in other actions of treſpaſs, the *tort* being ſeveral as well as joint.

Salk. 18.

3. "Where *a tort* has been committed by any officer of the "ſheriff, the party injured may have his action *either* againſt "the ſheriff, or againſt the officer, (as in the caſe of a vo-

"luntar

"luntary eſcape.) but where the injury is * cauſed by *a ne-* P. 373.
"*glect of duty*, in any of the officers of the ſheriff, the ac-
"tion muſt be brought againſt the ſheriff himſelf."

As where the action was againſt the under-ſheriff for em- Marſh v.
bezzling a writ, this *being a tort* was adjudged to lie againſt Aſtry, Cro.
the under-ſheriff. Eliz. 175.

But where it was againſt the under-ſheriff, for not exe- Cameron v.
cuting a bill of ſale to a nominee of the plaintiff's, of cer- Reynolds,
tain goods taken in execution, in purſuance of a promiſe; Cowp. 403.
this action was held not to lie, it ſhould have been brought againſt the ſheriff, as a breach of duty of office. But in fact, the under-ſheriff is not bound to make ſuch bill of ſale, therefore the action would lie in no caſe.

The principal caſes in which this action lies againſt the ſheriff or his officers, may be reduced to three heads.

1. That of eſcapes. 2. That of reſcues. 3. Of improper or informal executions. 4. Of falſe returns.

And firſt, of *Eſcapes.*

Under this head, I ſhall conſider 1. what ſhall be deemed a legal arreſt, ſo as to ſubject the ſheriff and his officers: for unleſs the arreſt is legal, this action will not lie. 2. What ſhall be deemed an eſcape. 3. In what caſes, and how far the ſheriff ſhall be liable. 4. What ſhall excuſe him, and how he may have redreſs.

*1. *What ſhall be deemed a legal Arreſt.* *P. 374.

1. *Bare words* will not make an arreſt, there muſt be an Genner v.
actual touching of the body: or what is *tantamount*, a power of Sparks,
taking immediate poſſeſſion of the body, and the parties ſub- 1 Salk. 79.
miſſion thereto. And therefore in this caſe where the bailiff ſaid to the defendant againſt whom he had the writ, he being at ſome diſtance, that he arreſted him by a warrant he had againſt him, and defendant having a fork in his hand, kept the bailiff at a diſtance till he retreated into the houſe; it was held to be no arreſt.

So where a bailiff having a writ againſt a perſon, met him Horner v.
on horſeback, and ſaid to him, "you are my priſoner," Battyn. Hil.
upon which he turned back and ſubmitted, this was held to 12 Geo. 2.
be a good arreſt, though the bailiff never laid hand on him. R. R. Bull.
But if on the bailiff's ſaying thoſe words he had fled, it had N. P. 62.
been no arreſt, unleſs the bailiff had laid hold of him.

2. The arreſt muſt be *by authority of the bailiff, to whom the* Blatch v.
writ is directed, that is he muſt be in company, but he need Archer,
not be the hand that arreſts, nor preſent, nor in the ſight of Cowp. 64.
the party arreſted: As here where he ſent his follower forward, who made the arreſt, he being at ſome diſtance and out of ſight, the arreſt was held to be good.

3. The arreſt by the bailiff muſt be *by virtue of a warrant* S. C. Ibid.
ſigned and ſealed by the ſheriff. A verbal authority is not ſufficient.

4. The

*P. 375. Hodges, v. Marks 485. Cro. Jac.

* 4. The bailiff when he makes the arreſt, need *not ſhew his warrant*, nor tell at whoſe ſuit the writ is, unleſs the party demands it: and if the bailiff has two warrants in his pocket, and produces neither, if the priſoner be reſcued, either party at whoſe ſuit the warrants were, may bring his action and recover.

Semaine's caſe, 5 Co. 92.

5. It is not lawful *to break open doors* to make an arreſt in any caſe of civil proceſs, for the law will not allow ſuch breach of the peace.

Park v. Evans, Hob. 62.

Therefore where bailiffs rapt at a door, and on its being open'd to ſee who was there, ruſh'd forcibly in with their ſwords drawn, the entry and arreſt were held to be unlawful.

Lee v. Ganſel, Cowp. 1.

But if the bailiff finds the outer door open, and enters peaceably, he may break open the *inner doors* to make an arreſt, and this was held ſo in the preſent caſe, where defendant was *a lodger*, whoſe room it was contended was as his dwelling houſe.

Howſon v. Walker, 2 Black. Rep. 823.

And though a perſon has been illegally arreſted as here by the bailiff's breaking into the houſe, yet if while in ſuch illegal cuſtody he is fairly charged with another arreſt, ſuch laſt arreſt ſhall be good: but there muſt be no fraud or colluſion, firſt to arreſt the party unlawfully, and then charge him with another action.

6. "By ſtat. 29 *Car.* 2. *c.* 7. § 6. no arreſt ſhall be made on "a *Sunday*, except in caſe of treaſon, felony or breach of "the peace."

*P. 376. Wilſon v. Tucker, Salk. 78.

* An arreſt on this day is therefore abſolutely void, inſomuch that the party arreſted may maintain an action of falſe impriſonment in conſequence of it.

Parker v. Sir Wm. Moor, Salk. 626.

1. But a perſon may be *retaken* on a *Sunday* by virtue of an eſcape warrant. This is now enacted by ſtat. 5 *Ann. c.* 9.

2. The bail may take their principal on a *Sunday*, and ſurrender him the next day.

Rex v. Myers, E. 26 G. 3. Term. Rep. 265.

3. But a conviction on a ſtatute and an order of committal to the houſe of correction, the party having no goods, is not a criminal proceeding within the ſtatute to allow an arreſt on a *Sunday*, but ſuch is void.

Devenage v. Dalby, Dougl. 369.

7. The writ to arreſt ſhould be within the proper county, or it ſhould ſeem that the arreſt is void; for where a perſon was arreſted by a bill of *Middleſex* in another county, the proceedings were ſet aſide for irregularity.

Froſt's caſe, 5 Co. 89.

8. If a perſon is in cuſtody of the ſheriff for one cauſe, delivering to him a writ againſt the ſame perſon for another cauſe, is a good arreſt, as here, where he was in on a *ca. ad reſp.* delivering a *cap. utlag.* was held good, and to ſubject the ſheriff on an eſcape.

2. What ſhall be deemed an Eſcape.

1. "Impriſonment making part of the debtor's puniſh-"ment, againſt whom a judgment was had and who could not

"pay

" pay, if *after the defendant had been committed to pri- *P. 377.
" ſon *on a capias ad ſatisfaciendum*, he was ſeen at large, it
" was at all times deem'd an eſcape in the ſheriff."

For where in debt againſt the ſheriff of *Bucks* for an eſ- Balden v.
cape, the eſcape aſſign'd was, that a perſon in priſon at the Temple,
ſuit of the plaintiff was ſuffer'd to walk at large through the Hob. 202.
town, though attended by a keeper, it was adjudged ſuch
an eſcape as ſubjected the ſheriff; and plaintiff had judgment.

2. " But to perſons taken *on meſne proceſs* only, the ſhe- 3 Blackſt.
" riff might ſhew them what indulgence he pleaſed, pro- Comm. 415.
" vided he had them forth-coming at the return of the
" writ."

But that is now altered by ſtat. 8 & 9 *W.* 3. *c.* 27. which enacts " That keepers of any priſon ſuffering any perſon
" committed on meſne proceſs or execution to go at large,
" except on *habeas corpus* or rule of court, ſhall be deemed
" an eſcape."

So that now if at any time the perſon committed is ſeen at Atkinſon v.
large, it is an eſcape in the ſheriff. Mattinſon,
3. By the ſame ſtatute it is further enacted, " That if the 2 Term Rep.
" marſhal or keeper of any priſon ſhall, after one day's no- 172.
" tice in writing, refuſe to ſhew any priſoner in execution
" to the creditor at whoſe ſuit ſuch priſoner was charged or
" to his attorney, ſuch refuſal ſhall be deemed an eſcape."

*4. " Where a new ſheriff is appointed, his predeceſſor in *P. 378.
" office ſhould hand over to him, all the priſoners in his 3 Co. 71.
" cuſtody with their reſpective executions, and if *he omit*
" *any*, it is an eſcape, and this ſhould be done by inden-
" ture." *Cro. El.* 366.

For where the priſoner, for whoſe eſcape this action was Weſtby's
brought, had been in the cuſtody of the former ſheriffs, at caſe,
the ſuit of the plaintiff and alſo of one *Dighton*, and in the 3 Co. 71.
indenture containing the names, *&c.* of the priſoners, the
execution at the ſuit of *Dighton* only was mentioned, and the
priſoner eſcaped; it was adjudged, that the former ſheriffs
were liable for the eſcape; for being delivered over for one
cauſe, he was out of execution for the other, and ſo it was
an eſcape immediately in the old ſheriffs.

If the former ſheriff dies, the ſucceſſor muſt at his peril S. C. Ibid.
take notice of all the perſons in cuſtody and their reſpective
executions. But till a new ſheriff is appointed, the under-
ſheriff is to take charge of the priſon, and is made liable by
ſtatute 3 *Geo.* 1. *c.* 15.—But in ſuch caſe the aſſignment by
the under-ſheriff need not be by indenture.

" For in no caſe ſhall the ſheriff be liable except the per- 2 Barnes,
" ſon who has eſcaped has been in actual cuſtody; that is, un- 259.
" legally arreſted by his own officers, handed over to him
" *in the gaol* by the former ſheriff, or *regularly delivered into*
" *the cuſtody of the marſhal.*"

For

*P. 379. Dawbridge-court's case, Cro. Eliz. 366.

*For where the old sheriff had a person in custody *in a private house*, and would there have assigned him over to the new sheriff, who refused to accept him, and the prisoner escaped, it was adjudged to be an escape in the old sheriffs, but not in the new; *for the prisoners can only be assigned in the common gaol.*

" So he must be regularly in custody of the marshal."

Watson v. Sutton, Salk. 272.

For where the prisoner was out on bail, and came and surrendered himself in discharge of his bail, by entering a *reddidit se* in the judge's book, the plaintiff's attorney accepted him in execution, and filed a *committitur* with the officer, and afterwards the prisoner escaped. This action was held not to lie against the marshal, for he *was not chargeable without notice*, which should be done either by serving him with a rule or entering a *committitur* also in his book.

Boothman v. Lord Surry, Trin. 27 Geo. 3. 2 Term Rep.

5. Where the bailiff of a liberty, having a return of writs and execution on them, brings a prisoner taken in execution out of his liberty to lodge him in the county gaol, it is an escape, and shall subject the bailiff.

Boyton's case, 3 Co. 42.

†6. Where the sheriff appointed a prisoner turnkey of the prison it was held to be a voluntary escape.

3. *In what Cases and how far the Sheriff is liable.*

†Wilkinson v. Salter & al. Cas. Temp. Hard. 311.

1. By stat. 8 & 9 *W.* 3. *c.* 27. § 9. " If any person desiring to charge another with any *action or execution, shall desire to be informed by the keeper of any prison, whether such a person is a prisoner there or not, the keeper shall give a true note in writing to such person or his attorney, under penalty of 50*l.* and such note acknowledging the person to be there shall be sufficient evidence that such person is in actual custody."

*P. 380.

Jackson v. Humphrys, Salk. 274.

When a person is so acknowledged to be in actual custody, delivering a writ to the sheriff against such person is an arrest in law, and will subject the sheriff or officer in case of an escape.

2. " The sheriff is only answerable for an escape from himself or from some of his officers."

Mayor and Burgesses of Windsor's case, Cro. Eliz. 26.

For where a *ca. sa.* was awarded to the sheriff of *Berks*, to take the body of *J. S.* who was then in the custody of the mayor, and burgesses of *Windsor*, and it being a liberty, he made his mandate out, directed to them as bailiffs of the liberty; afterwards *J. S.* escaped, and the action was adjudged to lie not against the sheriff, but against the mayor *&c. they not being officers of his.*

Bonner v. Stokeley, Cro. Eliz. 652. Cook qui tam v. Champneys 2 Stra. 901.

3. If the defendant is in custody of the sheriff, taken under a *capias utlag. on an outlawry* on mesne process, yet if the sheriff suffers him to escape, this action will lie. For though in fact the party is in custody at the suit of the king, and the plaintiff has no interest in his body, yet as the outlawry

will not be reverſed *without ſecurity given to appear to a new original, his eſcape is an injury to the plaintiff, and ſo the action lies. Sercole v. Hanſon, 1 Wilſ. 3. *P. 381.

4. "A diſtinction is to be obſerved between proceſs which "is void, and which is erroneous."

"For where the proceſs is void, no action will lie againſt "the ſheriff for an eſcape; but it will where the proceſs has "been erroneous or irregular only."

The ſheriff in this had the defendant in cuſtody on a *ca. ſa.* which had iſſued after the year and day without a *ſcire facias*, and defendant eſcaped, and the ſheriff was held to be liable, and that he could not take advantage of this irregularity; but it had been otherwiſe had the arreſt been made on a *cap. ad reſpond.* teſted of *Trinity*, and returnable the *Hilary* term following, for ſuch proceſs muſt be returnable from term to term, or it is out of court. Shirley v. Wright, Salk. 273. Buſhe's caſe, Cro. Eliz. 188. S. P.

So where the arreſt is founded on a *void judgment*, the plaintiff cannot recover for an eſcape, but it is otherwiſe where the judgment is erroneous. Gold v. Strode, Carth. 148.

"And wherever the court which gives the judgment has "juriſdiction, the judgment may be erroneous, but is not "void; but if the court has no juriſdiction, the judgment is "void." Ibid.

Therefore where a *ca. ſa.* was executed on a judgment of an inferior court, in debt on a *bond made *extra juriſdictionem*, and defendant had eſcaped, the court held that an action would not lie againſt the ſheriff. Anon. March 8. *P. 382.

And the reaſon why the ſheriff is charged in one caſe and not in the other is, *that though the proceſs is erroneous*, yet the ſheriff *may juſtify* under it, in an action for falſe impriſonment, and as he may therefore protect himſelf by ſuch means, he ſhall be charged.

On a recognizance in chancery, conuſee ſued execution by *ca. ſa.* under which conuſor was arreſted and eſcaped, it was adjudged, that though the *ca. ſa.* was erroneouſly awarded, yet that while it continued unreverſed, it was a good execution for the party, and the ſheriff was liable. Coniers, Sheriff of Durham's caſe, Cro. Eliz. 576. Weaver v. Clifford, Cro. Jac. 3.

2. *How far the Sheriff is liable.*

Treſpaſs on the caſe lies in caſes of eſcapes on *meſne proceſs*, in which the debt or damages not being aſcertained, plaintiff recovers in this action *damages* for loſing the benefit of his action, which are uncertain; but where the party has been in cuſtody *in execution*, wherein the debt and damages are liquidated, there, under the ſtat. *Weſt.* 2. and 1 *Rich. c.* 12. the whole are recoverable in an action of debt, with this exception, that where the plaintiff had execution on a ſtatute, of lands, goods and body, and the priſoner eſcaped, as the lands remained in execution, debt would not lie, but treſpaſs on the caſe. Bro. Ab. 19. 2 Inſt. 382. Pettey v. North, Cro. Eliz. 17. 2 Stra. 873.

And

*P. 383. * And note, that if the party escapes out of one of the counters, the action shall be brought against both Sheriffs; not against him only from whose counter the escape was made, for the two persons make but one Sheriff.

Ryding v. Edwin and Fleet, Carth. 145.

4. *What shall excuse the Sheriff, and how he shall have Redress.*

1. "The first case I shall consider in which the sheriff "shall be excused for an escape, is the case of *rescues.*"

If the sheriff arrests a person on *mesne process*, and he is rescued in going to gaol, the sheriff is not liable; for as the sheriff, if he meets the party against whom he has such process, is bound to arrest him if pointed out to him, and so he cannot be supposed to have the *posse comitatus* then with him: *in all cases of mesne process*, on the same principle, in *cases of rescue he shall be excused.*

May v. Proby, Cro. Jac. 419. Sir William Clarke's case, Cro. Eliz. 873.

But if such person be *once within the walls of the prison* after such arrest on mesne process, the sheriff shall in all cases be liable, except where the rescue is by the king's enemies, or the escape by reason of fire: but if a party of *rebels or traitors* breaks the prison, and lets the prisoners at large, the sheriff is liable on this ground, that he may always command the *posse comitatus*, and no power shall be presumed greater than that, except common enemies; besides, he may have remedy against traitors or rebels, by law, but not against common enemies.

1 Roll. Ab. 808. 4 Co. 84. a. 1 Roll. ibid. Year B. 33. H. 6. 1.

* And the law is the same in the case of arrests in final process:

1 Roll. Abr. 808.

*P. 384. "For, wherever the sheriff has time to prepare the *posse* "*comitatus*, he shall be liable in case of a rescue."

Therefore, where the sheriff was ordered to bring up the body in custody on mesne process, by *habeas corpus*, and defendant was rescued in going to court, the sheriff was held to be liable; for the sheriff having had notice when the body was to be brought up, he might have provided against a rescue by assembling the *posse comitatus.*

Crompton v. Ward, 1 Stra. 482.

"And in the case of a rescue, the party at whose suit the "arrest was made may maintain his action either against "the sheriff or against the rescuers. If, therefore, he elects "to proceed against the rescuers, it should seem that the "sheriff was discharged."

Mynn v. Coughton, Cro. Car. 109. Congham's case, Hutt. 98.

2. "A second ground of excuse for the sheriff, in case of "an escape, is a *recaption, upon fresh suit.*"

But 1. In the case of *voluntary escapes, the gaoler cannot re-take the prisoner*; but the plaintiff may by an escape warrant, and proceed against him to judgment, or against the gaoler. This is in the case of mesne process. And if the party so suffered to escape was in execution, the plaintiff may retake him after the twelvemonth without a *scire facias* for he is on the first execution.

3 Co. 52. b. Per Wilmot, C. J. 2 Wilf. 295. Lenthall v. Gardiner, Hil. 26 Car. 2. Bull. N. P. 69.

An

*And this though the plaintiff had recovered in an action against the gaoler, the ſum recovered being leſs than the debt. *P. 385. Collop v. Brandley, Trin. 31. Car. 2. Bull. N. P. 69.

†But in the caſe of *negligent eſcapes*, the gaoler may at any time retake the priſoner; though if the defendant eſcapes out of priſon, and the plaintiff ſends a diſcharge while he is ſo at large, the gaoler cannot juſtify retaking him for his fees. †Willing v. Goad, 2 Stra. 908.

§2. The priſoner muſt be taken *on freſh ſuit* to excuſe the ſheriff, and though he may have been out of ſight, (as in this caſe for a day and a night,) yet may the recaption be deemed freſh ſuit, and the ſheriff be excuſed; and though the priſoner might have fled into another county, yet may the ſheriff there retake him on freſh ſuit. §Rigeway's caſe, 3 Co. 52.

But the recaption muſt be *before action brought*, or it ſhall not be deemed freſh ſuit; for where it appeared that the recaption was not till after the action had been commenced, the marſhal was held to be liable for the eſcape from his priſon. Whiting v. Sir J. Reynell, Cro. Eliz. 657. Stonehouſe v. Mullins, 2 Stra. 873.

*And in this caſe, the recaption was on the *ſame day* of commencing the action, and the officer was held not to be diſcharged, the action being attached in the plaintiff. *Ball v. Briggs, 1 Jones, 145.

†So if the eſcape was involuntary, and the party returns of himſelf, and is in priſon, it ſhall excuſe the officer, for it is tantamount to a recaption on freſh ſuit. †Chambers v. Gambier, Com. Rep. 554.

*3. "In general to charge the ſheriff or his officers with "an eſcape, it muſt have proceeded either from connivance, "neglect or want of due care, and therefore in all caſes "where the ſheriff or his officers are acting under proper "authority, and an eſcape happens, he is excuſed." *P. 386.

Therefore where in an action for an eſcape againſt the marſhal he gave in evidence, that the perſon in priſon had been *let out to bail by order of court*, to proſecute an attaint, it was held a good juſtification, for it was not done out of his own head, but by command of the juſtices. Vaſt v. Gaudy, Cro. Eliz. 15.

4. "As in the caſe of voluntary eſcapes, the action lies "againſt the officer, permitting it, the ſheriff ſeems thereby "to be diſcharged."

And wherever the gaoler ſuffers a voluntary eſcape, from that moment he is a wrong-doer, and though the original defendant returns, and plaintiff proceeds againſt him to judgment after his return, yet it is no waiver of the action againſt the gaoler, but he may ſtill be ſued for damages. Ravenſcroft v. Eyles, 2 Wilſ. 294.

5. "And in the caſe of a voluntary eſcape, no ſubſequent "aſſent of the plaintiff in the action ſhall purge it."

For where to a *ſci. fa. quare executio non*, &c. upon a judgment, the defendant pleaded, that he had formerly been taken Scott v. Peacock, Salk. 271.

*P. 387. taken in execution on a *ca. ſa.* *upon the ſame judgment, and by the ſheriff ſuffered to eſcape, to which eſcape the plaintiff conſented; it was held no plea, for the ſubſequent aſſent could not make it an eſcape with the conſent of the plaintiff, but that he may either ſue the ſheriff or retake the party.

2. How far the ſheriff ſhall have redreſs, falls under this head.

Sulſton and Offley v. Paine, Cro. Eliz. 234. If the party in cuſtody on execution or otherwiſe, eſcapes, the ſheriff may have an action of treſpaſs on the caſe, *againſt him*, for the ſheriff is liable over to the plaintiff in the firſt action.

Sheriffs of Norwich v. Bradſhaw, Cro. Eliz. 53. And this action is maintainable by the ſheriff, againſt the perſon eſcaping, though he himſelf has not been ſued on the eſcape. For the party arreſted did a wrong by the eſcape, and the ſheriff is always liable to the plaintiff in the original action: and perhaps the perſon eſcaping might die, or leave the country before the ſheriff was ſued, and ſo he would loſe his remedy.

Atherton v. Harward. Cro. Eliz. 349. 2. But the *bailiff* who made the arreſt, and from whom an eſcape has been made, *cannot have caſe againſt the perſon eſcaping*, even though the ſheriff has recovered againſt *him*. For he is not chargeable to the ſheriff *by law*, but upon his own undertaking, and therefore as no reſponſibility is by law annexed to his office, the law gives him no remedy, as the wrong was not done *to him* but *to the ſheriff*.

*P. 388. *Having conſidered the caſes of eſcapes and reſcues, I ſhall now conſider thoſe on improper and informal executions.

3. *Of Improper or Informal Executions.*

1. By ſtatute 8 *Ann. c.* 17. § 1. "No goods ſhall be taken "in execution, unleſs the party before the removal of the "goods, at whoſe ſuit the execution or extent is ſued out, "ſhall pay to the landlord or his bailiff, one year's rent, (if "due) and the ſheriff or other officer is impowered to levy "the money ſo paid for rent as well as execution, and pay "it over to the plaintiff."

Palgrave v. Windham, 1 Stra. 212. 2 Wilſ. 141. "If therefore the ſheriff takes goods in execution, and removes them off the premiſes before the landlord has been ſatisfied for the year's rent, (*he having got notice* that the rent was due,) an action on the caſe lies againſt him, either at the ſuit of the landlord himſelf or of his executor or adminiſtrator, it being an injury to the eſtate.

S. C. Ibid. But theſe deciſions are to be obſerved.

Gore v. Goſton, 1 Stra. 643. 1. That the payment muſt be made by the plaintiff in the action, and the ſheriff ſhould not proceed in the execution till the rent is paid.

2. The landlord muſt be paid his whole year's rent, that is, without deduction of poundage for ſheriff's fees.

3. "Th

*3. "The ſtatute extends only to the caſe of the imme- *P. 389.
"diate leſſor."

For where the leſſee had under-let, and the under-leſſee's goods were taken in execution, the court held, that the ground landlord (that is the firſt leſſor) had no claim under the ſtatute of one year's rent, as againſt the eſtate of the *under-leſſee*, but that it was confined only to his leſſor, who was the original leſſee. Caſe of James Bennet, Eſq. 2 Str. 787.

4. "The ſtatute extends to all caſes of execution by *fi. fa.*

For where *defendant* had judgment as in caſe of a non-ſuit, and took out a *fi. fa.* for his coſts; it was adjudged that the landlord ſhould be paid his rent, before the execution was ſerved, though it was conteſted, that the ſtatute only extended to caſes of executions taken out *by the plaintiff*. Henchett v. Kempſon, 2 Wilſ. 140.

5. "But the ſheriff muſt in all caſes *have notice* of the rent "being in arrear, or he is not liable after he has levied the "money."

For where leſſee was in arrear of rent, and leſſor died, and before adminiſtration granted, a *fi. fa.* iſſued, and was executed by the ſheriff, on the goods of the leſſee: and afterwards adminiſtration was granted, it was adjudged that as there was no one to whom payment of the rent could be made, when the execution was levied, and the ſheriff was not obliged to retain, the adminiſtrator was without remedy, *and particularly, as the notice of rent arrear, ought to *P. 390.
come from the landlord. Waring v. Dowberry, 1 Stra. 92.

But in theſe caſes if the ſheriff has levied the goods, the landlord may avoid an action, by getting a rule of court on the ſheriff to pay him out of the money levied. 2 Wilſ. 141.

2. "Another caſe in which the ſheriff is liable to an action "under this head is this:"

If two writs of the ſame *teſte* came to the hands of the ſheriff, he ſhould by common law execute that firſt which is firſt delivered, the goods being bound *from the teſte*. But by the ſtatute of frauds, the goods are bound *from the day of delivery*, and ſo priority of delivery is an advantage. Therefore now whatever be the teſte, the firſt delivered ought to have priority of execution. And therefore if two writs of *fieri facias*, both come to the ſheriff on the ſame day, that which is firſt delivered, muſt be firſt executed. If therefore the ſheriff executes the laſt delivered *fi. fa.* firſt, it is an injury to the plaintiff in the firſt *fi. fa.* and he may have this action of treſpaſs on the caſe againſt the ſheriff, but the execution of the ſecond *fi. fa.* is good. Smallcombe v. Buckingham, Salk. 320.

The laſt claſs of injuries, for which this action lies againſt the ſheriff or other officers, is that of

4. *Falſe Returns.*

1. As where a ſheriff returned "*ſcire feci*" to a *ſcire facias*, when Griffith v. Walker, 1 Wilſ. 336.

*P. 391. when in fact he had given no notice: *this action was adjudged to lie. And that it might be laid in the county where the return was made, and was not confined to the sheriff's own county.

Powell v. Hord, 1 Stra. 650. So where the sheriff made a false return of *non est inventus*, to a writ of mesne process.

Hawkins v. Mildway, Cro. Eliz. 729. So where the sheriff had directed his warrant to the bailiff of a liberty to arrest the party, he made the arrest, and yet the sheriff returned *non est inventus*, and this action was adjudged to lie.

Sir William Clark's case, Cro. Eliz. 873. 2. It seemed the better opinion in this case, that if the sheriff makes *no return* to a writ, that this action will lie.

Williams v. Crey, Salk. 12. 3. The *executor* may maintain this action for a *false return in vita testatoris*, but this in the case of *final* only, not in the case of mesne process. (As where upon a *fi. fa.* the sheriff returned that he had levied a part, whereas in fact he had levied the whole.) For by the levying of the goods a right vested in testator, and so in the executor, as part of testator's estate. But in the case of mesne process, it is a tort which dies with the testator, no property having vested.

4. It is necessary to observe, that some returns are void, though no action will lie on them, they not being false.

Palmer v. Potter. Cro. Eliz. 512. As where the return was "*nulla bona*," and made *before the return* day of the writ, it is void. *For though the defendant may have no goods *at the time*, yet he may at the time of the return.

Lawrence v. Nethersole, Cro. Eliz 13. So where the return was that the defendant was attached *per catalla ad valentiam* 10*l.* this was adjudged a void return, for the return should set out *what the cattle were*, so that they might be forfeited, but upon such a general return
*P. 392. none of them could be forfeited.

5. But by statute 21 *Geo.* 2. *c.* 37. § 2. "No sheriff shall "be called upon to make any return to any writ, unless required so to do it, within *six months after the expiration of "his office.*"

1. The six months are to be *lunar* months.

Rex v. Adderley. Dougl. 446. †S. C. †2. The day the sheriff is superseded or goes out of office, is the first day, and reckoned inclusive.

Rex v. Jones Trin. 27 G. 3 2 Term Rep. 1. 3. But a mere request to the sheriff to return the writ is not sufficient, he must be required to make the return *by the rule of court*, or he shall not be liable.

These are the cases in which this action has been held to lie against sheriffs or their officers, I now proceed to the consideration of those actions which lie

2. *Against.*

* 2. *Againſt Attornies.* *P. 393.

" If in conſequence of any neglect, miſmanagement, or " corruption of the attorney, the client ſuffers any loſs " either in his ſuit or otherwiſe, he ſhall recover damages " in this action againſt the attorney."

As where the defendant was attorney to the plaintiff in a cauſe wherein plaintiff had a verdict, and the defendant in that action having been ſurrendered in diſcharge of his bail, the attorney neglected to charge him in execution, whereby he was diſcharged, the action was held well to lie againſt him. Ruſſell v. Palmer, 2 Wilſ. 325.

" But the damages in this action, muſt not neceſſarily be " to the full amount of the firſt judgment, and therefore " the remedy muſt be by this action, not in a ſummary " way."

For where in debt, the party was arreſted by defendant who was plaintiff's attorney, but he having neglected to declare againſt him in two terms, the party was diſcharged on common bail. Plaintiff applied for an order of court on the attorney *to pay the whole debt*, but it was refuſed; the court ſaying, that the plaintiff ſhould *bring his action* regularly againſt the attorney. For if the defendant in the firſt action was in ſolvent circumſtances, the plaintiff might ſtill recover againſt *him*, ſo that the *whole ſum* ſhould not *neceſſarily* go in damages againſt the attorney. Pitt v. Yalden, 4 Burr. 2060.

2. Where an attorney takes upon him to appear for another, the court looks no further, * but proceeds as if the attorney had ſufficient authority, and leaves the party to his action againſt him. Anon. Salk. 86. *P. 394.

3. " But the remedy for injuries, by this action, is not " confined to the caſe of attorney and client, for if in the " conduct of a ſuit againſt any perſon, an attorney is guilty " of any diſhoneſt or unwarrantable practices, he is ſubject " to this action, at the ſuit of the party grieved."

For where the plaintiff had been ſued by one *Lofft*, to whom the preſent defendant was attorney, which ſuit had been non-proſſed and coſts aſſeſſed; yet the defendant having knowledge of this, had unduly and maliciouſly procured a judgment to be ſigned againſt the plaintiff, at the ſuit of *Lofft*, and taken out execution, under which the plaintiff had been impriſoned until delivered by writ of ſuperſedeas: the action was held well to lie. Knight v. Copping, Hutt. 135.

But this caſe falls more properly under the head of malicious proſecution. *Quod vid. plenius.*

" 3. The laſt head of injuries which may be committed " by officers, falls under the diviſion of thoſe committed by " *juſtices of peace.*"

For any breach or neglect of their duty of office, this action lies againſt them.

1. As

2 Hawk. P. C. 90. 14 H. 7. 7 H. 19. Hale P. C. 97.

1. As if a juſtice of peace denies, refuſes or obſtructs bail where it ought to be granted, * for ſuch conduct he is liable to an action on the caſe.

*P. 395.

† Green v. Hundred of Buccleſchurch, 1 Leon. 323.

†2. So where plaintiff was robbed, and he went to a juſtice of peace, to take his depoſitions for the purpoſe of charging the hundred, which the juſtice refuſed to take, whereby the action againſt the hundred was loſt. This action was adjudged to lie againſt the juſtice.

Theſe are the moſt material caſes falling under the head of injuries by officers, I ſhall now conſider

2. *Injuries by private Perſons.*

Theſe are diviſible into two heads, 1. To injuries where there has been a truſt; 2. Where there has been no truſt. Injuries where there has been a truſt form the head of bailment, of which there are many diviſions.

Bailment is of ſix kinds.

2 Ld. Raym. 903. Com. Rep. 134.

" The firſt is a naked bailment, to keep for the uſe of the " bailor, without any profit to the bailee: In this caſe the " bailee is not chargeable, except in caſe of groſs negli- " gence; mere want of care is not ſufficient."

Mytton v. Cock, 2 Stra. 1099.

As where plaintiff who was owner of a cartoon, left it with defendant who was an auctioneer, without any agreement to take care of it or re-deliver it ſafe, or without any agreement for a reward, and the cartoon was ſpoiled, for which the plaintiff brought this action, * when it was adjudged on a motion for a new trial, that it was proper evidence to be left to a jury, whether the defendant had been guilty of any groſs neglect in the keeping of it, for ſuch alone ſhould charge him; and the jury found for the plaintiff on that ground.

*P. 396.

2. " The ſecond kind of bailment is, the entruſting of " goods *to be carried* for hire or reward, in which caſe the " bailee is chargeable for any loſs, this is the caſe of *car-* " *riers.*"

Co. Litt. 89. Coggs v. Barnard, 2 Ld. Raym. 909. in which caſe this doctrine is examined at great length.

1. At common law a carrier is liable by the cuſtom of the realm, to make good all loſſes of goods entruſted to him to carry, except ſuch loſſes as ariſe from the act of God, or of the king's enemies: To which may be added, ſuch as ariſe from the default of the party ſending them.

‡ Lane v. Cotton, 1 Salk. 143.

‡ As if a carrier is *robbed*, he ſhall be liable for the loſs, not on the ground that he may charge the hundred under the ſtatute of *Wincheſter*; but becauſe, that if it was otherwiſe, he might by colluſion procure himſelf to be robbed, and defraud the owner of the goods; and ſo in other caſes where the grounds are the ſame.

But 1. *the act of God* ſhall excuſe the carrier.

Amis v. Stephens, 1 Stra. 128.

As where the defendant's hoy having goods of the plaintiff on board, in coming through the bridge, was by a ſudden guſt of wind, driven againſt the arch and ſunk; the owner

owner * of the hoy was held not to be liable, the damage having been occaſioned *by the act of God*, which no care of the defendant's could provide againſt or foreſee. And though in this caſe the plaintiff gave in evidence, that if the veſſel had been better ſhe would not have ſunk in conſequence of the ſtroke. Chief Juſtice *Pratt* held, that a carrier was not obliged to provide a new carriage for every journey, it is ſufficient if he provides one which without any extraordinary accident will perform the journey. *P. 397.

And upon this ground, of its being the act of God, if a bargeman in a tempeſt, for the ſafety of the lives of his paſſengers, throws over-board any trunks or packages of value, he is not liable for the loſs. Graves v. Barge, 1 Roll. Rep. 79.

" But if the carrier of his own accord goes into dangers " from which a loſs is likely to accrue, the act of God ſhall " not excuſe him."

As in the caſe of *Amies* v. *Stephens* before, where it was further held, that if the hoyman had gone to ſea *voluntarily in bad weather*, ſo that there was a probability of his ſhip being loſt, that he would not have been excuſed.

" But it muſt fully appear that the loſs *was* occaſioned by " the act of God, in order to excuſe the carrier's preſump- " tion; that *it might ſo have happened* will not be ſufficient."

* For where defendant, who was a carrier, having lodged his waggon in an inn, an accidental fire broke out, which conſumed it; he was adjudged to be liable, though it was contended, that it did not appear in this caſe *how* the fire broke out, ſo that it might be by lightning, and ſo be the act of God. *P. 398. Forward v. Pittard, Mich. 26 Geo. 3. B. R. 1 Term Rep. 27.

It was further held in this caſe, that negligence does not enter into the grounds of this action; for though the carrier uſes all proper care, yet in caſe of a loſs he is liable.

2. " The next exemption from loſſes by a carrier is where " it is done by the *act of the king's enemies*; but they muſt " be public enemies, not traitors or felons."

For where it was found on a ſpecial verdict, that the plaintiff had delivered to defendant on board his ſhip the goods in queſtion, and that there was a ſufficient crew for the ſhip, but that at night eleven perſons boarded the ſhip as pirates, under pretence of preſſing, and plundered her of the goods; it was adjudged, that though by the admiralty law, if the ſhip is robbed by pirates, the maſter is diſcharged, yet that cannot hold in this caſe, the ſhip being *infra corpus comitatûs*, the defendant was therefore liable, for ſuperior force ſhould not excuſe him. Morſe v. Slue, 1 Vent. 109. 2 Lev. 69. 1 Mod. 85. S. C. Barclay v. Higgins, Paſch. 24 Geo. 3. quot. 1 Term Rep. 33. S. P.

3. " And laſtly, *the default of the owner of the goods loſt* " *himſelf* ſhall exempt the carrier in caſe of a loſs."

For

*P.399. * For where in an action againſt a carrier for negligently carrying a pipe of wine, which by that means burſt, and the wine ſpilt, it was adjudged good evidence for the defendant, that the loſs happened while defendant was driving gently, and aroſe from the wine's being in a ferment, ſo that the loſs was occaſioned by ſending it in that ſtate.

Ferrar v. Adams, Paſch. 10 Ann. per Holt. Bull. N. P. 74.

So if a carrier's waggon is full, and yet a perſon forces his goods on him, and they are loſt, the carrier is not liable; for it was the owner's folly to act with ſo little precaution.

Lovett v. Hobbs, 2 Show. 127.

4. " But for all other accidents and perils the carrier is " liable, from whatever cauſe they proceed."

As where in an action againſt a barge-maſter for goods ſpoiled by water, defendant proved, that when the goods were put on board, that the veſſel was tight, but that the damage was occaſioned by a rat's eating out the oakum, through which the water came, it was held no excuſe.

Dale v. Hall, 1 Wilſ. 281.

2. " But in order to charge the carrier, theſe circum- " ſtances are to be obſerved."

1. " The goods muſt be loſt *while in the poſſeſſion of the* " *carrier himſelf, or in his ſole care.*"

For where the plaintiffs ſent their ſervant with the goods in queſtion on board the veſſel, * who took charge of them, and they were loſt, the defendant was held not to be liable, for the goods were in the poſſeſſion not of the defendant but of the plaintiff's ſervants.

East India Company v. Pullen, 1 Stra. 690. *P.400.

2. " The carrier is liable only ſo far as *he is paid*, for " he is chargeable by reaſon of his reward."

For where a man delivered a bag, containing money to a carrier, and being aſked how much it contained, anſwered 200*l.* for which only he paid, and the carrier gave a receipt accordingly; in fact the bag contained 400*l.* the carrier was robbed; and he was held to be liable only to the amount of 200*l.* being ſo much only for which he had received payment.

Tyley v. Morris, Carth. 485.

3. " Under a *general acceptance* a carrier is bound for " whatever he receives, but under a *ſpecial acceptance* for " ſo much only as he *bonâ fide* undertakes to carry."

As if a carrier aſks what is in a box, and is told ſilk; if it be money, and it is loſt, the carrier is liable, unleſs he made a ſpecial acceptance. But the intended cheat may perhaps induce the jury to give leſs damages than otherwiſe.

Drinkwater v. Quennel, Trin. 11, 12 Geo. 2. C. B. Bull. N. P. 75.

" But under a ſpecial or qualified acceptance he is bound " no farther than he undertakes."

For where the owner of a ſtage-coach put out an adverti ſement, that he would not be anſwerable for money, plate or

Gibbon v. Paynton, 4 Burr. 2298.

or jewels above the * value of 5*l.* unleſs he had notice, and was paid accordingly: it was adjudged in this caſe, that all goods ſo received by this coach were under that ſpecial acceptance, and that if money or plate was ſent by it without notice and being paid for, that if loſt, the coach-owner was not liable. *P. 401.

And note, that the notice in this caſe was by an *adverti*ſement *in the newſpaper*, though it was proved that the plaintiff had been ſeen reading it; but the court held that notice ſufficient, and *per Yates* juſtice, a perſonal communication is not neceſſary to conſtitute a ſpecial acceptance. S. C. ibid.

2. In this caſe Lord *Mansfield* ſeemed to be of opinion, that in all caſes of ſending things of great value, as money or jewels, by a common carrier, that the carrier ſhould have notice of it, and be paid accordingly; contrary to the caſe of *Titchburn* v. *White*, 1 *Stra.* 145. ſomewhat ſimilar to that of *Drinkwater* v. *Quennel*, *ſupra*. S. C.

4. "A delivery to the carrier's ſervant is a delivery to "himſelf, and ſhall charge him; but they muſt be goods "ſuch as it is the cuſtom of the carrier to carry, not out of "his line of buſineſs."

As where plaintiff declared that defendant was owner of a ſtage-coach, in which he had taken a place, and delivered a trunk to the driver of the carriage, for taking care of which he had given him a gratuity, the trunk was loſt, and on action brought, *Holt* C. J. was of opinion, that this action did not lie againſt the maſter, for that a *ſtage coachman* was *not* within the cuſtom as a *carrier*, *unleſs he takes a diſtinct price for the carriage of goods*, for his buſineſs is only to *carry perſons*. Here was no price paid, the money given to the coachman being but a gratuity, not a price for the carriage; and the maſter is bound for the act of his ſervant only while he acts in purſuance of his authority. Middleton v. Fowler, 1 Salk. 282. *P. 402.

5. "Where goods are loſt which have been put on board a ſhip, the action may be brought either againſt the maſter or againſt the owners."

For the owners are liable in reſpect of the freight, and having employed the maſter; for whoever employs another is anſwerable for him, and undertakes for him, and the maſter is chargeable on the ſame ground, for he may have an action for the freight. But if an action is brought againſt the owners, *they ſhould be all joined* in the action, for it is *caſus ex contractu* as to all. Boſon v. Sandford, 2 Salk. 440.

Though if one only is ſued, he muſt *plead it in abatement* that there are other partners, for he ſhall not be allowed to give it in evidence, and nonſuit the plaintiff. Rice v. Shute, 5 Burr. 2611.

6. It is not neceſſary in order to charge the carrier that the goods are loſt *in tranſitu* while immediately under his care. For he is *bound to deliver them* to the conſignee or ſend notice Golden v. Manning. 3 Wilſ. 429. 2 Black. Rep. 916. S. C.

*P. 403. notice to him according to the direction. And though they are carried ſafely to the inn, yet if left there till they are ſpoiled, and no notice given to the conſignee, the carrier is liable.

Rowning v. Goodchild, 3 Wilſ. 443.

And the law is the ſame in the caſe of *letters*, which the poſt-maſter *muſt deliver* at the houſes of the inhabitants within the poſt-town.

Davis v. James, 5 Burr. 2680.

And note, that either conſignor or conſignee may bring the action for goods loſt againſt the carrier, and if the action is brought by the conſignor, the objection that the property is in the conſignee does not lie in the mouth of the carrier, for the property is no part of the queſtion as to him, and particularly if the agreement for payment was with the conſignor.

7. "But laſtly, in order to charge a perſon for goods loſt when committed to him to carry, it muſt appear that the "perſon was a carrier, and the goods in the way of his bu- "ſineſs."

But any perſon carrying goods for hire is a carrier, and

Dale v. Hall, 1 Wilſ. 281. Rich. v. Kneſland, Cro. Jac. 330.

chargeable as ſuch for any loſs; as waggoners, captains of ſhips, lightermen and ſuch like.

But to theſe are the following exceptions:

‖ Upſhare v. Aidee, Com. Rep. 25.

‖ 1. *Hackney Coachmen* are not carriers within the cuſtom of the realm, ſo as to be chargeable for the loſs of goods, unleſs paid expreſsly for * the purpoſe, for they undertake but for the carriage of the *perſon*; and on the ſame ground *ſtage coachmen* are not liable, unleſs they are paid extra.

*P. 404. Lane v. Cotton, 1 Salk. 17.

2. The *poſtmaſters general* are not liable for loſſes of bills or notes of value out of letters put into the poſt-office, for the poſt-office is for *intelligence* not for *inſurance*, and it is impoſſible that the poſtmaſters can be anſwerable, who are to execute their offices in ſo many and ſo very diſtant places.

Whitfield v. Lord Le Deſpencer, Cowp. 754.

And this was ſo adjudged, though it appeared that the note in queſtion had been taken out of the letter *by a clerk employed in the poſt-office*, as a ſorter of letters.

3. By ſtat. 7 *Geo.* 2. *c.* 15. "The *owners of ſhips* are only "liable for any loſs by reaſon of embezzlement, ſecreting "or making away of any gold, ſilver or diamonds, or "other merchandize of value by the maſter or mariners "*to the value of the ſhip and freight.*"

Sutton v. Mitchell, Mich. 26 Geo. 3. 1 Term Rep. 18.

This ſtatute was made to protect the owners againſt all treachery of the maſter and mariners, to ſubject *them* only ſo far as *they* truſted the maſter and crew, that is to the value of the ſhip and freight. It is neceſſary therefore under this act to prove, that the maſter or ſome of the mariners was privy to the ſpoiling of the ſhip; as here, when one of the mariners gave notice to the thieves when a quantity of dollars was put on board, which the thieves plundered, and gave part to the mariner.

* If a perſon is owner of a ſhip, though he hires it out, yet if he covenants for the condition of the ſhip and the behaviour of the captain, he is liable. *P. 405. Pariſh v. Crawford, 2 Stra. 1251.

§3. "The third ſpecies of bailment is a delivery by way of "*pledge*, which is called *vadium*. As to which." § Com. Rep. 134.

† 1. "If the goods ſo pawned be ſtolen, the pawnee ſhall "be diſcharged, for he had a ſpecial property in them him- †Co. Litt. "ſelf, and therefore he is bound to keep them no otherwiſe 89. "than as his own."

But if the pawner tenders the money, and the pawnee refuſes it, and keeps the goods, if they are afterwards loſt, the pawnee is chargeable; for after the tender, the goods ceaſe to be a pledge, and the pawner may trover for them. Manby v. Weſtbrook, 29 Geo. 2. K. B. Bull. N. P. 72.

2. If the pawn be of ſomewhat which is not the worſe for wearing, as jewels or ſuch like, the pawnee may uſe them, but then it is at his peril, for if loſt ſo, he ſtands at the loſs; but it is otherwiſe if the pawn has been locked up, and not uſed. But if the pawn be of ſuch a nature, that the keeping is a charge to the pawnee, as if it be a cow or a horſe, the pawnee may milk the cow or ride the horſe, and this in recompence of the keeping. Anon. 2 Salk. 522.

4. "A fourth ſpecies of bailment is the delivery of goods "for hire, as hiring out an horſe, which is called *locatio* or *conductio*; and * here the hirer is to take all imaginable care, "and if, notwithſtanding, the thing be loſt, he is not liable." Com. Rep. 134. *P. 406.

5. A fifth ſpecies of bailment is a delivery of goods for "ſome purpoſe (as to merchandize) without any reward. "It is called an *acting by commiſſion*, and though the bailee "is to have nothing for his trouble, yet if there was any "neglect in him, he will be anſwerable, for his having un- "dertaken a truſt is a ſufficient conſideration. But if the "goods are loſt without any default in him, he is not "chargeable, for his having taken reaſonable care ſhall "diſcharge him."

As where the plaintiff had ſo bailed goods to defendant, to merchandize for him, which were loſt, and on an action brought, defendant pleaded that he had lodged them ſafely in a warehouſe at *Porto Bello*, from whence they had been taken by the enemy, and demurrer for cauſe, that by putting them out of his poſſeſſion he had *not taken due care* of them; but *per Cur.* if the warehouſe was not a place of ſafety, plaintiff ſhould have replied ſo, for a ſpecial bailee is not to carry the goods about with him, and if he lodges them in a place of ſecurity, he ſhall not be charged in caſe of a loſs. Goſwell v. Dunckerley, 1 Stra. 681.

6. "The laſt ſpecies of bailment is a delivery of goods "from the keeping of which ſome profit ariſes to the bailee; "as oxen to plough with, which are to be returned in ſpecie; "this is called an accommodation, a lending *gratis*. In this "caſe, Com. Rep. 134.

*P. 407. Co. Litt. 37. a. "caſe, the borrower is bound * ſtrictly to keep the thing ſo "lent, for if he be guilty of the leaſt neglect, he ſhall be "anſwerable, though he ſhall not be charged where he is "in no fault."

Com. Rep. 136. But in this caſe the bailee muſt uſe the thing lent in the manner intended; as if a man lends another an horſe to go into the Weſt, and he goes into the North, and the horſe

Ibid. dies, the bailee is chargeable; but if the horſe be ſtolen out of the ſtable without any fault of the bailee, no action lies; but otherwiſe, if he leaves the door open negligently, and the horſe is ſtolen.

Under this head of bailment ſeems to fall the action againſt *Innkeepers*, for they are chargeable with any loſſes happening in their inns by reaſon of the profit, ariſing either from the keeping of the horſes, &c. of their gueſts, or from the profits from the gueſts themſelves.

As to whom it has been reſolved:

Calye's caſe, 8 Co. 32. Cro. Jac. 224. 1. The perſon chargeable as an innkeeper muſt be the *keeper of a common inn*, for ſuch only are chargeable for the loſs of the goods of the gueſts whom they entertain.

†Maſon v. Grafton, Hob. 245. †It was moved in this caſe in arreſt of judgment, that the plaintiff, in his declaration againſt the defendant, who was an innkeeper, had ſet out the houſe only as *hoſpitium*, not as *commune hoſpitium*; but it was over-ruled, for *hoſpitium* means a common inn; it would be *domus*, not *hoſpitium*, if it was not *commune*.

*P. 408. Calye's caſe, ibid. *2. It muſt appear that the perſon robbed in the inn was a *traveller* and *gueſt*; for if a neighbour comes to an innkeeper, and deſires a lodging, ſuch perſon is not a gueſt to recover againſt the innkeeper.

3. "So he *muſt be received* as a gueſt by the innkeeper, in "order to make him chargeable."

Bird v. Bird, 1 And. 29. Anon. Moor. 78. For if a traveller comes to an inn, and the innkeeper tells him his houſe is full, and the traveller replies, that he will ſhift or take his chance in the inn, which the innkeeper ſuffers him to do, and the traveller is robbed, the innkeeper is not liable. But if the traveller had not uſed theſe words and the innkeeper notwithſtanding his firſt objection had admitted him, he had been chargeable; for in the firſt caſe the traveller takes all riſk of loſs upon himſelf, and the innkeeper refuſes to take charge; but in the latter caſe, the admiſſion is an implied waiver of the firſt denial, and ſo reſtores the right of charging him.

4. "The loſs to the gueſt muſt be occaſioned *by the act* "*the innkeeper, or ſome of his ſervants, or through their* "*glect*."

Calye's caſe, 8 Co. 22. Therefore if the gueſt is robbed *by his own ſervant or companion*, the innkeeper is not liable, becauſe it was the gueſt's fault to have ſuch perſons with him. But if the innkeeper appoints another perſon to ſleep in the room with his gueſt and he is robbed, the innkeeper is liable.

5. Th

*5. The inn-keeper is only anſwerable for ſuch goods of his gueſts, *as are within his houſe*, and ſo are under his care. And therefore if a gueſt at an inn, orders his horſe to be turned out to graſs, and the horſe is ſtolen, the inn-keeper is not liable: but if he had turned the horſe to graſs, out of his own head, he had been liable, for it was his own act, and the horſe entirely in his own care. *P. 409. S. C. Ibid.

And even while the things are in the inn, if the inn-keeper directs the gueſt to place his goods in a particular place, under lock and key, or he will not be anſwerable for them, and the gueſt refuſes or neglects to do ſo, but puts them in another place, and they are loſt, the inn-keeper in that caſe is not chargeable. Brand v. Glaſs, Moor. 158. Dyer 266.

But without ſuch particular direction from the inn-keeper, if the goods are loſt, it will be no excuſe to ſay that he delivered the key of the chamber to the gueſt, and that he did not acquaint the inn-keeper what the goods were: or that the thief is diſcovered. Calye's Caſe, Ibid.

6. "As the inn-keeper is chargeable on the ground of the profit he derives from his gueſt or his goods, *where there is no profit* to the inn-keeper, there ſhall be *no charge*."

Therefore if a gueſt comes to an inn, and departs leaving his goods there, and tells the inn-keeper that he will return a few days, and during his abſence the goods are loſt, the inn-keeper ſhall not be charged; for he has no profit or gain from the keeping of ſuch dead *goods, and therefore ſhall not be chargeable for their loſs. Gelley v. Clark, Cro. Jac. 188. Noy. S. C. *P. 410.

But to this are theſe exceptions.

1. It muſt not be a temporary abſence, as if the gueſt goes out in the morning about buſineſs, and returns before night, this is not ſuch an abſence as ſhall excuſe the inn-keeper. Sir Edwin Sandy's Caſe, Cro. Jac. 189.

2. This is confined to the caſe of *dead goods*, for if the gueſt leaves *his horſe* there for any time, though he is not there himſelf, the inn-keeper ſhall be charged in caſe of a loſs; for the ſtanding of the horſe *is a profit to the inn-keeper*, and in reſpect of that he is chargeable. York v. Grindſtone, Salk. 388.

3. It was adjudged in this caſe, that where to an action againſt an inn-keeper for goods loſt in his inn, he pleaded, that at the time the plaintiff lodged in his inn, *he was ſick and of non-ſane memory*. On demurrer to this plea, it was held, that if a man keeps an inn, he ought at his peril to have care of the goods of his gueſts, and if he be ſick, that his ſervants ought; and that it lieth not for him to ſay, that he was of non-ſane memory to diſable himſelf in this action, more than in debt on an obligation. Croſs v. Andrews, Cro. Eliz. 622.

The writ againſt inn-keepers, mentions only *bona & catalla*, which properly does not comprehend deeds or writings, which are only *choſes in action*; yet by reaſon of the words in the writ, "*ita quod hoſpitibus nullum eveniet damnum*," Calye's Caſe, 8 Co. ante.

*P. 411. "*damnum*," they are comprized, and for the loſs of theſe plaintiff may declare ſpecially.

Ibid. But theſe words confining the loſs to moveables, the inn-keeper ſhall not be liable for any *loſs or injury done to the perſon* of his gueſt, while in the inn, as an aſſault, battery or ſuch.

Beedle v. Morris, Cro. Jac. 224. Yelv. 162. S. C. 9. If a ſervant is robbed of his maſter's property, the maſter may maintain this action, againſt the inn-keeper at whoſe inn the goods were loſt.

†Drope v. Thayne. Noy, 79. Poph. 179. †And in ſuch ſuit by the maſter, he need not ſhew that the ſervant was on a journey, for perhaps he was at the end of his journey; as in *London* on his maſter's buſineſs.

‡Drope v. Thayne, Latch. 127. ‡10. If one jointtenant of goods is robbed, both may join in this action.

§Anon. Keilw. 50. §11. Another caſe in which an action lies againſt an inn-keeper, as ſuch, is for refuſing to entertain a traveller, and to provide his horſe with meat, he tendering him the proper price for the ſame.

Anon. Dyer 158. pl. 33. Theſe are the moſt material caſes which have been decided under the head of injuries to private property, where there is an expreſs or implied truſt.

We ſhall now treat of injuries to perſonal property in caſes where there is no truſt.

*P. 412. * The firſt is the caſe of *Bankrupts*.

Brown v. Chapman, 3 Burr. 1418. If any perſon ſhall maliciouſly ſue out a commiſſion of bankruptcy againſt another, which commiſſion is afterward ſuperſeded, an action on the caſe lies againſt ſuch petitioning creditor, at the ſuit of the bankrupt, and this notwithſtanding the bond given in purſuance of ſtat. 5 G. 2 c. 30. to the chancellor for 200*l.* and by him aſſignable to the bankrupt for this bond may be inadequate to the damage ſuſtained and though there is the ſame remedy under the ſtatute, yet 'tis a common law remedy, and the ſtatute being in the affirmative both ſtand together.

2. The next claſs of injuries to perſonal property falling under this head, is that of *Diſceit*.

This reſpects warranties or frauds in the caſes of ſales, Where there is ſome fraud or deceit on the part of the ſeller 2. Impoſition from cheating or falſe pretences.

Frauds or deceit in the ſeller may be either, 1. In the value *of the thing ſold*. 2. In the *ſeller's title to it*.

1. "Where a thing is of a *certain value*, and *that known* "*to the ſeller*, but cannot be known to the buyer, for a "deceit, in the affirming the value to be different from what "it is, this action lies."

* As where the landlord of an houſe wiſhing to diſpoſe of his intereſt in it, affirmed the rent to be more than it really was, whereby the purchaſer was induced to give more for it than it was worth, this action was held to lie; for the value of the rent was a matter of private knowledge between the landlord and tenant. *P. 413. Riſney v. Selby, 1 Salk. 211.

"But if the buyer has it in his power to inform himſelf of "the true value and neglected it, the action will not lie." S. C.

As if the landlord had only ſaid, that *J. S.* would give ſo much for it, whereas *J. S.* had never offered any thing, the action would not lie, for the buyer might have enquired from *J. S.* and been informed of the truth. Lord Raym. 1118.

This is the caſe of things of certain value, but where the things ſold are *of uncertain value*, that is which may depend on whim or fancy, as *pictures, or ſuch things* which may be of more value to one perſon than to another, there no action will lie, in caſe of taking an exorbitant price. Leakins v. Cliſſell, 1 Sid. 146.

2. "From theſe caſes it appears, that a man is chargeable, "in the caſe of ſelling any thing for more than its value, "*knowingly*."

"But it alſo lies for a ſale of a thing where the ſeller *is* "*ignorant* of the value, and that is, where he ſells it *with* "*a warranty* of its value or quality." Harvey v. Younge, Yelv. 20.

* As where the plaintiff declared, that the defendant being a goldſmith, and having ſkill in precious ſtones, had a ſtone which he affirmed to be a *Bezoar* ſtone, which he ſold to him for 200*l. ubi revera*, it was not a *Bezoar* ſtone. Defendant pleaded not guilty; and plaintiff had a verdict; and judgment was afterwards arreſted; becauſe that the declaration had not charged, either that the defendant ſold it *knowing* it not to be a *Bezoar*, or that he *had warranted it* for ſuch a ſtone. *P. 414. Chandler v. Lopus, Cro. Jac. 41.

3. "If the *ſervant ſells* any thing in the way of his maſ"ter's buſineſs, and *warrants it*, if there is any fraud or "deceit, the maſter is liable."

As where a goldſmith's apprentice ſold an ingot of gold and ſilver, upon a ſpecial warranty, that it was of the ſame value with an aſſay then ſhewn, and upon evidence it appeared, that he had forged the aſſay, and made the ingot out of a lodger's plate that he had ſtolen; the maſter was held to be liable. Grammer v. Nixon, 1 Stra 653.

"And even though the ſeller himſelf has been deceived "by his ſervant, yet is he liable to the buyer."

For where a merchant ſold ſilk to another, which afterwards appeared not to be of the kind the purchaſer meant to buy, whereby he was impoſed upon in the value; he recovered againſt the ſeller, though it appeared that there was no actual deceit in the ſeller, but that it was in his fac- Horn v. Nichols, 1 Salk. 289.

tor

*P. 415. tor beyond ſea; for he ſhould be * anſwerable for the deceit of his factor *civiliter*, though not *criminaliter*. And ſince ſomebody muſt ſuffer, it is more reaſonable that he who truſted the factor, ſhould be a loſer than the other.

4. "But in order to charge the ſeller by reaſon of his "warranty, it muſt be obſerved."

1. "That the warranty does not *extend to defects viſible to* "the eye of the buyer, for of theſe he muſt be apprized at "the time of the ſale, but if the defect is not viſible, there "a general warranty ſhall extend to it, and ſubject the "ſeller in caſe of a fraud."

Finch's Law, 189. As a warranty on the ſale of cloth, that it is of ſuch a length, and it turns out to be otherwiſe, this action lies againſt the ſeller: becauſe ſuch a defect is not viſible to the eye, but is to be diſcovered only by meaſuring.

Butterfield v. Burroughs, Salk. 24. But where the warranty was on the ſale of an horſe, which was warranted ſound by the ſeller, and it appeared afterwards that *he was blind*, this action was held to lie, for though blindneſs is a defect in general viſible to the eye, yet *in horſes it requires ſkill to diſcern it*.

Finch's Law, 289. 2. "The warranty muſt be made *at the time of the ſale* "and not after it, in order to charge the vendor; for if "made after the ſale, 'tis made without conſideration: nei- "ther does the buyer *then* take the goods on the credit of "the ſeller."

*P. 416. * "So the warranty ſhould be in the preſent tenſe, that

3 Black. Com. 159. "the thing *is ſound*, not that *it will be ſound*."

3. "An offer of a warranty *at one time*, ſhall not extend "to a *ſubſequent ſale* of the ſame thing."

Anon. 1 Stra. 414. For where the defendant came to the plaintiff, who was a ſword-cutler, and offered to ſell him a ſecond-hand ſword, and warranting the hilt to be ſilver: the plaintiff offered him a guinea and a half for it, which the defendant then refuſed: but having offered his ſword to many ſword-cutlers, and none bidding him ſo much as a guinea and half, he returned to the plaintiff who then would give him but twenty-eight ſhillings, which defendant took: It appeared afterwards that the gripe only was ſilver, and the reſt braſs; upon which the plaintiff brought his action on the firſt warranty, when the court were of opinion that it did not extend to the ſubſequent ſale, and the plaintiff was non-ſuited.

Southern v. Howe, 2 Roll. Rep. 5. 4. If the vendor knowing the goods to be unſound, uſe any art to diſguiſe them: or if they are in any ſhape different from what he repreſents them to be to the buyer, this action lies; for this artifice ſhall be deemed equivalent to an expreſs warranty.

2. "The ſecond ſpecies of fraud in the ſeller on which "this action is founded, is where there is a fraud in the re- "preſentation he makes *of his title* to the thing ſold."

*As where the plaintiff declared that the defendant, affirming a certain horſe to be his own, and that he had bred him, ſold him to the plaintiff; whereas in fact he had never bred him, and he was the property of *J. S.* the plaintiff recovered notwithſtanding there was no expreſs warranty or averment that defendant knew that the horſe belonged to *J. S.* *P. 417. Harding v. Freeman, Style 311.

And the buyer may maintain this action againſt the ſeller, who ſo ſells, without any title, the goods of another, though he has never ſuſtained any damage, or the true owner has not retaken them, or ſued him for them; for the ſale under theſe circumſtances is itſelf an offence, and if he ſhould wait till the goods were retaken, he might be remedileſs, and ſuſtain a miſchief. Furnis v. Leiceſter, Cro. Car. 474. Croſs v. Gardiner, S. P. Show 63.

2. The giſt of the action therefore is the ſale, the ſeller *knowing* the goods not to be his own property, for the declaration muſt be, that he did it *fraudulently*, or *knowing them not to be his own*. It is therefore incumbent on the plaintiff to prove that fact, that *defendant knew the things ſold not to be his own* at the time of the ſale; for if defendant had a reaſonable ground to believe them to be his property, (as if he bought them *bonâ fide*,) no action will lie againſt him; but defendant cannot plead ſuch matter, he muſt give it in evidence. Medina v. Stoughton, Salk. 210. Lord Raym. 593. S. C.

3. Of the ſame nature with this fraud is where a perſon affirming that certain goods are the property of his friend, and that he has authority to ſell them, in fact ſells them, he having no ſuch authority; in which caſe this action lies for the deceit. Warner v. Tallerd, quot. 9 Danv. 176 Pl. 7.

In this caſe the deceit being in the falſe affirmation, it will be ſufficient for the buyer to prove them the goods of another, without proving that defendant knew them to be ſo, (for it need not be averred in the declaration,) and this proof would be ſufficient to put defendant upon proof that he had authority to ſell them. *P. 418. Bull. N. P. 30.

But in both caſes, if the ſeller is *out of poſſeſſion* of the thing ſold at the time of the ſale, no action will lie againſt him, though the thing ſold was not his own, unleſs there was an expreſs warranty; for being out of poſſeſſion there was room to queſtion his title, and in ſuch caſes it is *caveat emptor*. Medina v. Stoughton, Salk. 218. 2 Reſ.

As where the defendant affirming that he was incumbent of the living of *Stoke*, ſold the tithes to the plaintiff, when in fact he was not incumbent, and had no title, the action was held not to lie, on the ground above mentioned, of not being in poſſeſſion. Roſwell v. Vaughan, Cro. Jac. 196.

2. The ſecond ground of this action, as founded on deceit, is where an injury is done to any perſon from an impoſition in cheating or uſing falſe pretences.

As where money was left in the hands of a third perſon to be delivered to the plaintiff, and the defendant pretending Thompſon v. Gardner, Moor. 583.

*P. 419. to ſuch perſon that he * was the plaintiff, obtained the money, this action was adjudged to lie againſt him.

Harris v. Bowden, Cro. Eliz. 90.

" So for cheating a perſon with falſe cards or dice of any " ſum of money this action will lie."

†Johnſon v. Pye, 1 Sid. 258.

†But it was decided in this caſe, that where a perſon, affirming himſelf to be of full age, had obtained ſeveral ſums of money, whereas in fact he was under age, and ſo not liable to the money borrowed, that the action did not lie; for being an infant, his contracts were all void.

Skinn. 119. Garford v. Richardſon, Trin. 36 Car. 2.

So aſſuming a falſe character, and by that means committing a cheat is actionable. As if a man, pretending to be ſingle, prevails on a woman to marry him, when in fact he is married, this action will lie. *Sed quære* this being felony.

Bull. N. P. 32.

‡But if a woman who is married commits a ſimilar fraud, no action will lie, for all acts of a feme covert are void.

3. A third caſe of injury to perſonal property for which this action lies is

‡ Cooper v. Whetham, 1 Lev. 247.

For not procuring an Inſurance.

Smith v. Laſcelles, Hil. 28 Geo. 3. 2 Term. Rep. 187.

For where a merchant gives inſtruction to his correſpondent to effect an inſurance on a ſhip of his, and he neglects to do it, *caſe* lies under the following circumſtances, 1ſt. when the merchant abroad has effects in the hands of *his correſpondent in *England*, he is bound to inſure if ordered

*P. 420. ſo to do, for the merchant abroad has a right to appropriate his money in the hands of another in any manner he thinks proper. 2dly. When there are no effects of the merchant abroad in the hands of the other, but the courſe of dealing has been ſuch that the one has been uſed to ſend orders for inſurance and the other to comply; in ſuch caſe, if the merchant here neglects to make an inſurance, he ſhall be liable, unleſs he has given notice to diſcontinue ſuch dealing. 3dly. Where the merchant abroad has ſent bills of lading to his correſpondent in *England*, he may engraft on them an order to inſure, as the implied condition on which they are to be accepted, which the merchant here muſt obey if he accepts them.

Wallace v. Tellfair, Sitt. Guildhall, 1786. coram Buller juſt. 2 Term. Rep. ibid.

But if the merchant abroad limits the merchant in *England* to too ſmall a premium, ſo that no inſurance can be procured, the merchant here ſhall not be liable.

†Smith v. Cadogan, ibid.

†So where the merchant here uſes due diligence to procure an inſurance, which cannot be done, (as here, becauſe the ſhip was not regiſtered at *Lloyd's* coffee-houſe,) and he afterwards, by other means, gets an inſurance, which turns out ineffectual, but without his fault; as where it was ſent to a houſe at *Newcaſtle*, which houſe fraudulently kept the policy, the merchant here was held to be diſcharged.

For

*For in general, if the merchant here acts *bonâ fide*, and is not guilty of any negligence, he ſhall not be liable. *P. 421. Moore v. Morgue, Cowp. 479.

3. OF INJURIES TO REAL PROPERTY.

Having conſidered the injuries which occur under the head of Injuries to perſonal Property; I ſhall now conſider thoſe which fall under this head of

Injuries to real Property, or Chattels real.

Injuries to real property fall under the two heads of 1. *Nuiſance*; 2. *Diſturbance*; the firſt reſpecting corporeal, the latter incorporeal hereditaments.

1. *Of Nuiſance.*

Nuiſance is either to the houſe or to the land.

1. *Of Nuiſance to the* Houſe.

1. "If a man has an ancient houſe, and another builds ſo "near to him that he deprives him of the benefit of light "and air, by darkening his windows, this action lies againſt "the wrong-doer." 9 Co. 58.

"But to maintain this action, the houſe muſt be an *ancient* "*houſe*; that is, have ſtood there time immemorial; for if "two men have land adjoining, and one builds a houſe on "his own *land, and makes his windows look into his "neighbour's land, though his houſe may have ſtood thirty "or forty years, yet may his neighbour build an houſe on "his own land, and obſtruct the other's lights; for *cujus eſt* "*ſolum ejus eſt uſque ad cœlum*, and it was folly in the firſt "perſon to build ſo near the land of another." Bury v. Pope, Cro. Eliz. 118. *P. 422.

2. But if a man builds an houſe upon any part of his own land, and afterwards ſells that houſe to another, neither the vendor nor any perſon claiming under him ſhall be allowed by any erection to ſtop the lights, for no man ſhall be allowed to do an injury in derogation of his own grant. Palmer v. Fletcher, 1 Lev. 122.

3. But where a man has ſuch ancient meſſuage, and ſo preſcribes to have his lights uninterrupted, no contrary preſcription to ſtop the lights ſhall be alledged againſt it; for each being ſuppoſed to have exiſted from time immemorial, the latter cannot be deemed more ancient than the former. 9 Co. 58. b.

4. "It ſhould ſeem, that where a man builds his houſe "*near a ſtreet*, he is entitled to all the privileges of an an- "cient meſſuage."

For this action was adjudged to lie againſt the commiſſioners for paving, for raiſing the ſtreet ſo high as to obſtruct the plaintiff's lights and windows; for the ground of the ſtreet being appropriated to the Public, excludes the idea of folly in building near the ground of another, and cloſe to the ſtreet is the moſt proper ſituation. Leader v. Moxon & al. 3 Wilſ. 461. 2 Black. Rep. 924. S. C.

*P. 423. 9 Co. 58.

* 5. But raiſing a wall to obſtruct *a proſpect*, or in any wiſe to prevent it, is not actionable, for it only deprives the party of a matter of pleaſure, and abridges him of nothing either uſeful or neceſſary.

Weſtborn v. Mordaunt, Cro. Eliz. 191. 2 Leon, 103. S. C.

6. A recovery of damages in this action does not diſcharge the nuiſance, *for every continuance of it* ſubjects the offender to a new action, and therefore a perſon may recover damages for a nuiſance to an houſe which commenced before he came into poſſeſſion, if it exiſted when he entered.

†Roſewell v. Prior, Salk. 460.

†Therefore where the plaintiff recovered damages againſt the defendant for a nuiſance to his houſe, and the defendant afterwards under-let it, and this action was for a continuance of the nuiſance *after the under-leaſe*: this action was held to lie, for as he was before liable to an action for the continuance, he ſhould not diſcharge himſelf by his own act of under-letting, and as he had a rent in conſideration of the continuance, he ought to anſwer for the damages it occaſioned.

Rippon v. Bowles, Cro. Jac. 373.

So alſo may an action be maintained *againſt the aſſignee* for a continuance of the nuiſance; but with this diſtinction, that where the whole miſchief has been done to the plaintiff by the firſt erection, there the action will not lie againſt the aſſignee; but where the continuance occaſions a new nuiſance, the aſſignee is liable.

Symonds v. Seybourne, Cro. Car. 324.

7. This action may be maintained by the *leſſee for years*, for obſtructing the lights of an * ancient meſſuage, grounded on the *preſcription*, notwithſtanding the weakneſs of his eſtate, for the preſcription is *to the houſe*, *not* to the *perſon*.

*P. 424. Jeffer v. Giffard, 4 Burr. 2141.

So alſo may he in *reverſion* as well as he in poſſeſſion maintain an action for a nuiſance, by obſtructing the lights; for it is an injury to the *inheritance*, as well as to the preſent enjoyment, and each may have his own action.

2. A ſecond ſpecies of nuiſance to the houſe conſiſts in *over-hanging it*, or building ſo near to the houſe of another, that the water falls off his roof on that of his neighbour, and thereby injures and rots it.

Reynolds v. Clark, 1 Stra. 634.

Of the ſame nature alſo was the caſe of putting up a ſpout, which conveyed the water into the premiſes of the adjoining neighbour. This was a nuiſance, and actionable.

Wm. Aldred's caſe, 9 Co. 57. a.

3. A third ſpecies of nuiſance to the houſe is by infecting it with bad and noiſome ſmells, ſo as to make it unwholeſome to reſide in; but this falls under the firſt head, of injuries to the Perſon.

2. I ſhall now proceed to

Nuiſance to the Land.

1 Roll. Ab. 89. Rex v. White, 1 Burr.

1. "If any perſon erects a ſmelting houſe, or works for "making *aqua fortis*, or ſuch like, the *vapour and ſmoke of* "*which ſpoils the graſs or corn, or injures the cattle* of his neighbour,"

" neighbour, * it is a nuiſance to the land, for which this " action lies." *P. 425.

2. If a perſon ſuffers the ditch adjoining to his neighbour's land to become foul, or throws ſtones or rubbiſh into it, which cauſes it to overflow, and ſo injures the land, this action will lie for the injury. Weſtbrown v. Mordaunt, Cro. Eliz. 191.

3. So if a perſon who has a right to a ſtream of water running to his land or mill, and another perſon turns it, or if that perſon, having a right to the uſe of it in a certain proportion, varies from that proportion, treſpaſs on the caſe will lie againſt him. As in this caſe, where defendant preſcribed to have water from a certain water-courſe, running through the plaintiff's ground, to two pits on his ground, for watering his cattle, it was adjudged that an action lay for deepening and widening thoſe pits. Brown v. Beſt, 1 Wilſ. 174.

But where a man has by preſcription a right to a ſtream of water, he may *vary the uſes* to which it is applied; as where formerly there were fulling-mills, he may alter them to corn mills, if he does not alter the quantity of the water. Luttrel's caſe, 4 Co. 84.

4. Another injury to the land is, if a man ſuffers ſuch a number of conies upon his land that they go in on that of his neighbour, and ſpoil it, and yet for this no action will lie, for they are animals *feræ naturæ*, in which he has no property. *Vid. Poſt.* 430. Bowlſton v. Hardy, Cro. Eliz, 547. 5 Co. 104. S. C.

* Note, That where a nuiſance is done to the land of two tenants in common, they ſhall join in this action, for it is perſonal, and concerns the profits of the land. *P. 426. Some v. Barwiſh, Cro. Jac. 231.

5. " Another injury to the land for which this action lies, " is *againſt a parſon or impropriator for not taking away his* " *tithes*, which by lying on the graſs, rot and deſtroy it."

But firſt, " A parſon or impropriator, is not obliged " to take away the tithes *till they are ſet out:* So that no " action will lie till then, except there is a cuſtom to the " contrary."

For where the action was brought for not taking away of tithes *by degrees* as cut, the tithes being ſo ſet out, grounded on a cuſtom ſo to take them: It was reſolved, 1. That it was not ſufficient to eſtabliſh this mode of tithing, that the former parſon 50 years ago, had ſo taken the tithes. 2. Nor that ſuch mode *was the cuſtom of adjoining pariſhes*; though it had been otherwiſe if it had been the cuſtom of the whole county. Furneaux v. Hutchins. Cowp. 807.

2. " Where the tithes are ſet out, no notice by the com- " mon law is neceſſary; but it is required by the eccleſiaſ- " tical law. And this notice is often required by cuſtom, in " which caſe it is good." 3 Burr. 1892.

For where this action was brought againſt the plaintiff, who was impropriator of tithes, for not fetching away the tithes within a reaſonable time after being ſet out, the defendant * relied on the cuſtom of the pariſh, " that notice Butler v. Heathby, 3 Burr. 1891.

ſhould *P. 427.

ſhould be given to the owner of the tithes, of the ſetting of them out," which in this caſe had not been done: the cuſtom was held to be a good and reaſonable one, and the defendant had judgment.

Theſe are the moſt material caſes falling under the head nuiſance. I ſhall now conſider thoſe under the article

2. *Of Diſturbance.*

This belongs to incorporeal hereditaments. And firſt of diſturbance of *Ways*.

Cantrell v. Church, Cro. Eliz. 84. ib. 466. S. P.

1. "If a perſon has a right to a private way over the "land of another, and that way is obſtructed or ſhut up, "the perſon having ſuch right, may maintain for ſuch ob- "ſtruction an action on the caſe."

Finch's Law, 63. Co. Litt. 56.

2. This right of way ariſes, 1. From the grant of the owner of the ſoil. 2. From preſcription which ſuppoſes an original grant. 3. From operation of law: As where a man grants a piece of ground in the middle of his field, he tacitly gives a right of way to it, as neceſſary to its enjoyment.

Clark v. Cogg. Cro. Jac. 170. 189.

So where a man having four cloſes, ſold three of them and reſerved the middle one, without any ſaving of a way to it, and there was none but over the cloſes he had ſold; it was reſolved that the law reſerved to him a right of way to it over thoſe he had ſold.

*P. 428.

* As to the firſt. "Conſtant and uninterrupted uſage of "a way, though not going the length of preſcription, ſhall "carry ſuch a preſumption of a grant, as to give a good "valid right of way over the lands of another."

Keymer v. Summers, Hereford Summer Aſſizes 1769, Buller N. P. 74.

For where in an action for obſtructing a way, the plaintiff proved, that one *Fowler* was ſeized both of plaintiff's tenement and of the defendant's cloſe; and in 1753, had conveyed to the plaintiff the tenement, with all ways therewith uſed, and that this way had gone with the tenement as far back as memory could go: the defendant produced a ſubſiſting leaſe for three lives from *Fowler*, made in 1723, by which he demiſed the field in queſtion, in as ample a manner as one *Rock*, a former tenant had had it, and in this leaſe there was no exception of a way over the cloſe. *Yates*, J. held that by the leaſe without the reſervation of way, that it was gone, and ſo could not paſs under the words *all ways* in the conveyance. But as the defendant's leaſe had by 30 years preceded the plaintiff's conveyance, and the way had been uſed all that time, that was ſufficient to afford a preſumption of a grant or licence from the defendant, ſo as to make it a way lawfully uſed at the time of the conveyance, and then the words of reference would operate on it, and the way paſs.

As to the ſecond. "But where a way is claimed by pre- "ſcription, if a grant of it appears, the preſcription is ne- "ceſſarily at an end, and mere uſage after, gives no right."

For

*For where in a caſe for ſtopping a way, the plaintiff proved it to have been a way as far back as witneſſes could remember, but, defendant producing a leaſe made of this way for 56 years, that it might be a paſſage during that time, which term had expired *A. D.* 1728, ſome years before this action was brought: the Chief Juſtice held, that the leaving the way open for a few years after the term ended, was not ſufficient to make it a gift to the public. *P. 429. Rex v. Hudſon, 2 Stra. 909.

" But though a perſon may have a good right of way, yet " that ſhall be deſtroyed by unity of poſſeſſion." Surry v. Piget, Latch. 153. Poph. 166.

§As if *A.* ſeiſed of *Blackacre*, and *C* of *Whiteacre*, and *A.* has a right of way over *Whiteacre* to *Blackacre*, and *A.* afterwards purchaſes *Whiteacre*, the right of way is extinct: and if *A.* afterwards enfeoffs another perſon of *Whiteacre*, the ſevering of the poſſeſſion does not reſtore the right of way, if no reſervation nor grant is made of it: for a right of way lying in grant, and being one extinct, by grant only can it be revived. §11 H. 5. 4. Year book. 21 E. 3. 2. 2 Shep. Ab. 156.

2. A ſecond ſpecies of diſturbance for which this action lies, is for a diſturbance of the right of *Common*.

But 1. The ground of this action as far as reſpects the commoner, is, that he is deprived of his common, ſo that he cannot enjoy it in ſo ample a manner as he is entitled, and therefore if the treſpaſs be ſo ſmall, that the commoner has not any or a trivial loſs, *this action will not lie for him; but the lord may have treſpaſs immediately for any injury. Robert Mary'ſcaſe, 9 Co. 112. *P. 430.

2. The commoner has no property in the ſoil, for that ſtill remains in the lord who may exerciſe any act of ownerſhip, which does not detract from the commoner's right of common: As he may put conies on the common, and the commoner cannot deſtroy them, or fill up their burrows. 1 Burr. 265. Bellew v. Langdon, Cro. Eliz. 876.

But if they increaſe ſo faſt, and in ſuch numbers as to deſtroy the common, the commoner can have this action againſt the lord, on the ground that he cannot enjoy his common in ſo ample a manner, *&c.* Cooper v. Marſhall, 1 Burr. 260.

3. Turning an ancient *watercourſe* is another injury for which this action lies. Vernon v. Goodrich, 1 Stra. 5.

3. A third ſpecies of diſturbance is, that to the right of holding *fairs* or *markets*.

If any perſon is entitled to hold a fair or market, and another perſon ſets up another fair or market ſo near to the former, as to prejudice its cuſtom, this action lies for the injury.

1. " But to ſupport this action, it muſt appear, that the " plaintiff's fair or market was the elder one, for otherwiſe " he is himſelf the wrong-doer." Hale on F. N. B. 184.

2. But

*P. 431. Bracton Lib. 2. cap. 24.

*But it is sufficient to make it a disturbance, that the second fair or market is erected *within seven miles* of the former, that is, one third part of a day's journey, reckoning at 20 miles, for so the day being divided into three parts, he has one third to go, one third to return, and one third for his business.

3. "So if the second fair or market is held on the same "day with the former, it is a disturbance, and even if held "on a different day it may be a disturbance."

Yard v. Ford, 2 Saund. 173. 1 Lev. 296. S. C.

As where the plaintiff declared generally that he was seised of a market, and that the defendant had erected another, without any lawful warrant, within seven miles of his market. Exception was taken in arrest of judgment, that the plaintiff had not said that it was on the same day, but it was over-ruled, particularly it being after a verdict.

4. A fourth species of disturbance is,

Croyton v. Lithebye, 2 Saund. 115,

If a man is entitled by prescription, to have all the corn of the tenants of a certain manor ground at his *mill*, this action lies against any of the tenants, who carries his corn elsewhere to be ground.

Blissett v. Hart, Mich. 18 G. 2. B. R. Bull. N. P. 76.

5. A fifth species of disturbance for which this action lies; if a man has an ancient *ferry*, and another sets up a new ferry near it, the owner of the first ferry may have his action for the injury, in drawing away his custom.

*P. 432. 2 Roll. Ab. 140.

*For he who has an ancient ferry, is compellable by law to find boats safe and fit for the purpose, and if he does not, he may be amerced: And as the law therefore imposes such a burden on him, it will protect him in the exclusive and uninterupted enjoyment of such right. And therefore where the law has imposed no such obligation, it gives no such exclusive right.

1 Roll. Ab. 107. Hale on P. N. B. 184.

As if a man sets up a new *mill or school* in the neighbourhood of an ancient one, an action will not lie, though a damage may from thence accrue to the former mill or school: for such rivalship is of public benefit and advantage, and it is *damnum absq. injuria*.

6. "Another species of disturbance for which this action is "given is, if a person having a right to sit in a particular "*pew* in a church, is disturbed therein, his remedy is by "action of trespass on the case."

Gibs. Codex. 221.

This right to sit in a particular pew of a church, arises either from prescription, as appurtenant to a messuage, from keeping it in repair, or from a faculty from the ordinary: for in him is the disposition of all the pews, except those claimed by prescription.

Stocks v. Booth, Mich. 27 G. 3. K. B. Term Rep. 428.

As therefore the disposition of the pews, is *primâ facie* in the ordinary, in case of any disturbance in the enjoyment of the pew, the plaintiff must make out his title, either against the ordinary, or against a wrong-doer, by shewing his title by prescription to the pew, as appurtenant to a messuage, or under a faculty from the ordinary.

But

*But there seems this difference; that where the action is against *a stranger* for a disturbance, plaintiff need not state nor prove *repairs*, it is sufficient to lay his title generally, as appurtenant to a messuage. But where the action is against *the ordinary*, he should shew both prescription, as appurtenant to a messuage and repairs; for in this case, the plaintiff declared on his right to the pew, as appurtenant to an ancient messuage, and that he, *&c.* had used to repair it, but no repairs were proved; and the first was held to be sufficient, the defendant being a stranger. *P. 433. Kenrick v. Taylor, 1 Wilf. 326.

But an uninterupted possession for 60 years will not give a title, if neither a faculty or prescription appears. Stocks v. Booth, ante.

It seemed in this case, that the declaration ought to state repairs: but that the want of it would be cured by a verdict. Buxton v. Bateman, 1 Lev. 71. 1 Sid. 201. S. C.

7. The last species of disturbance which I shall consider is, that of *offices*.

1. If any person has a title to any office, from whence fees or profits are derived, and he is disturbed in that office, he shall have an action on the case for such disturbance. Earl of Montague v. Lord Preston, 2 Vent. 171.

†But the plaintiff in such action must shew, that it was an office in fee, and had fees annexed to it: for if an office is not of that nature, there is no injury, and so no action will lie. †Harvey v. Newlyn, Cro. Eliz. 859.

*2. The principals of the several offices belonging to the courts, have not a power of turning out their clerks at pleasure, unless in cases of misbehaviour or misconduct: and in this case, an action on the case was adjudged to lie against the defendant who was *custos brevium*, at the suit of the plaintiff, who was one of the under-clerks, and turned out of his employment by the defendant his principal, without any sufficient reason or fault. *P. 434. Whitchurch v. Paget, 1 Sid. 74.

It now remains to treat of the last class of injuries, for which this action lies, *viz.*

4. INJURIES TO PERSONAL RIGHTS, not properly reducible to any of the foregoing heads.

These injuries may be divided into. 1. Such as affect a man standing in some relation to others. 2. Where there is no relation.

Injuries affecting a man as standing in some relation to others, may be divided into, such as affect him in the several relations. 1. Of an husband. 2. Of a father. 3. Of a master.

And first of those affecting him in the relation of an *husband*.

1. "If any person intices away the wife of another to live apart from him, without sufficient cause, the husband may have this action for the injury."

As

*P. 435. Winſmore v. Greenbank, Mich. 19 G. 2 C. B. Bull. N. P. 78.

*As where the plaintiff declared, that his wife unlawfully and without his conſent, had departed from him and lived a-part, during which time a conſiderable real and perſonal eſtate had been deviſed to her, to her ſole and ſeparate uſe, and that thereupon ſhe was deſirous of returning, and again cohabiting with him, but that the defendant enticed her, and perſuaded her to continue abſent, by which means ſhe continued abſent till her death, whereby he loſt the comfort and ſociety of his wife, and the advantage he ought to have had from ſuch real and perſonal eſtate; after a verdict for the plaintiff, and 3000*l.* damages, it was moved in arreſt of judgment, that this was an action *primæ impreſſionis*: but the court ſaid that every action on the caſe, was in itſelf a novelty. No action lies without damages, and the *per quod* will not be alone ſufficient, except the act done be unlawful: but though a bare enticement will not be ſufficient nor actionable, yet the jury under the direction of the judge, are judges of the legality. And as receiving the ſervant of another *ſcienter*, is a ground for an action, *a fortiori* it is ſo in the caſe of an huſband: and injuries that are within the nature of ſpiritual cognizance, if attended with temporal damages are actionable.

Grey v. Liveſey, Cro. Jac. 501.

2. If in conſequence of an enormous battery of his wife, or any other bodily injury done to her, the huſband is deprived of her ſociety and aſſiſtance, he may have a particular action for the injury, and declare for a *per quod ſervitium amiſit*.

*P. 436. Hyde v. Scyſſor, Cro. Jac, 538.

*And the ground of the action being, the loſs of the wife's company, not the injury to the wife herſelf, ſhe need not join in the action.

2. The next claſs of injuries falling under this diviſion are ſuch as affect a man as ſtanding in the relation of a *father*.

Tullidge v. Wade, 3 Wilſ. 18. Poſtlethwayte v. Parks, 3 Burr. 1787. Bennett v. Allcott, Mich. 28 G. 3. 2 Term Rep. 166.

An action will lie at the ſuit of the father for getting his daughter with child.

But the daughter ſhould be at the time reſident in her father's houſe, or the action will not lie. In this caſe Lord *Mansfield* held, that ſhe ſhould be under the age of 21 years; but, in the caſe of *Tullidge* v. *Wade*, it was held to be no objection, the daughter being above that age. And the point was expreſsly decided in this caſe.

But note, this offence is properly ſued, not in this action, but in treſpaſs *vi & armis*, the father conſidering the daughter as his ſervant, and declaring for an aſſault with a *per quod ſervitium amiſit*. But the caſes are inſerted here for the ſake of uniformity, and it ſeems doubtful whether this action would not lie, it being an act unaccompanied with force, and the damages being given for the conſequential injury, the loſs of reputation, *&c.* to the family. This was recognized in the caſe above of *Tullidge* v. *Wade*, where it was attempted to ſet aſide the verdict for exceſſive damages.

And per *Buller*, J. 2 *Term Rep.* 167. an action merely for debauchin

debauching a man's daughter, by which she loses her service, is an action on the case. *Vide* 2 Ld. *Raym.* 1032.

*2. A father cannot maintain this action for an excessive battery of his son, and the subsequent injuries arising from it, as that he could not marry him as before. Gray v. Jeffries, Cro. Eliz. 55.

3. The last class of injuries falling under this head, are those which affect as a man standing in the relation of a *master*. *P. 437.

1. If any person inveigles away the servant, or apprentice of another, and prevails on him to quit his service; it is an injury for which this action lies. Hambleton v. Vere, 2 Saund. 169.

But in such case the person hiring must *have notice*, that the servant was then in the service of another and not discharged, for otherwise he might hire the servant, ignorant of the circumstances, and so would do no injury, unless after notice he refused to discharge him. Anon. Winch 51. F. N. B. 390.

For it is no excuse for the defendant, who has hired the plaintiff's servant to say, that *he did not intice him away*, but that the servant came away *of his own accord*, and hired with the defendant, if the defendant had notice that the servant had so deserted the plaintiff's service, and yet he still retained him. Fawcet v. Beavres. 2 Lev. 68.

2. A *journeyman* in any trade is a servant, while in the employment of the master tradesman, and an action lies for enticing him away, even though such journeyman worked only by the piece, and for no certain time. Aldridge v. Hart, Cowp. 54.

*3. But where a person was so hired to work at a trade for a limited time, *under a penalty* not to discover the secrets of his master's trade, but having quitted his place, *the master sued him and recovered the penalty*; this was held to discharge the second master from an action for hiring him, the penalty being deemed full satisfaction for the loss of service. *P. 438. Bird v. Randall, 3 Burr 1345. 2 Black. Rep. 387. S. C.

4. "In general, if by any injury received from any person, a servant is *disabled in his service*, the master may recover damages for *such loss of service*, by this action." 1 Roll. Abr. 88.

As if a person digs a ditch in the highway, in which a man's servant falls and breaks a limb, the master may recover in this action for the injury, for the loss of service; and so of other injuries of the same kind.

2. I shall now consider *injuries to personal rights*, which a person may receive, *without relation to others*.

1. "If any person stands candidate for any elective office, and the returning officer *refuses him a poll*, and returns another; trespass on the case lies against such officer." Sterling v. Turner, 3 Lev. 50. 1 Vent. 25. S. C.

As where the plaintiff declared, that he was candidate for the office of bridge-master, within the city of *London*, and that the defendant as mayor, should hold the poll, and that he refused a poll to the plaintiff: the plaintiff recovered in this action. And it was further resolved, that it need not

be

*P. 439. be averred in the *declaration, that the plaintiff would have been elected.

Aſhby v. White, Salk. 19. 2. If a perſon who is entitled to *vote at any election*, for members of parliament, *tenders his vote* to the returning officer, *which he refuſes to admit or allow*, he is ſubject to this action at the ſuit of the voter; For per *Holt*, the right of voting is a noble privilege, of which by this means he is deprived.

Bagg's Caſe, 11 Co. 99. 3. If any returning officer holds an election, or is called upon to make any return, wherein the right of a third perſon is concerned, and *he makes a falſe return* to ſuch a writ on ſuch election: as a ſheriff of members to parliament: a mayor of a corporation to a *mandamus*, &c. an action on the caſe in theſe inſtances lies againſt them.

Prideaux v. Morris, Salk. 502. Where the right of a ſeat in parliament has been decided in favour of the perſon not returned by the returning officer, or where it could not be decided, as where the parliament was diſſolved, an action at common law lies againſt the returning officer, but not otherwiſe. N. B. In 1 *Wilſ.* 127. Ch. J. *Willes* denied this caſe to be law. *Sed quære.*

But a further remedy is now given by ſtat. 7 & 8 *W.* 3. *c.* 7. "which enacts, That if any ſheriff or other officer makes "a falſe return of members to ſerve in parliament, the party injured, (that is he who ſhould have been returned,) "ſhall recover double damages and coſts."

*P. 440. * 1. An action lies in purſuance of this ſtatute *in all caſes* of a falſe return, not ſolely where there has been a reſolution of the houſe of commons deciding the right to the ſeat.

Sir Watkins Wynne v. Middleton, 1 Wilſ. 125. 2 Stra. 227. §2. The ſtatute is not merely penal, but is alſo a remedial one; on which ground an amendment was allowed.

S. C. †3. By the ſame ſtatute, a return contrary to the laſt reſolution of the houſe of commons, ſhall be deemed a falſe return, and ſo ſubjects the officer to this action. And by §. 3. a return of more perſons than are required by the writ or precept to be choſen, in like manner ſubjects the returning officer.

§S. C.

†S. C.

2 Black. Com. 111. 4. As to the caſe of *mandamus's*, the return was formerly abſolute, and ſo an abſolute injury was done to the party, and therefore this action was given to him for redreſs, but now by ſtatute 9 *Ann. c.* 20. the party may traverſe the return, and is not put to his action.

Bull. N. P. 26. Note, An action for a falſe return, muſt be brought either in *Middleſex*, where the return is, or in the county from whence it is made.

Theſe are the moſt material general heads, under which injuries for which this action lies, may be claſſed. I ſhall mention a few caſes of a more particular nature.

1. An

1. An action on the case lies against any person, *for infringing on a patent* granted to another, but it is incumbent on the patentee at * the trial, to prove in support of his patent, that he has made a full and fair disclosure in his specification, of the manner of doing that, for which he has the patent: for if he gives an ambiguous or unintelligible account, or containing matters not in the thing for which he has the patent, in such case the patent is void. Turner v. Winter, Hil. 27 G. 3. B. R. 1 Term Rep. 602. *P. 441.

And as a grant of a monopoly or patent, may be to the *first inventor*, by stat. 21 *Jac. c.* 1. So if the invention be new in *England*, a patent may be granted, though the thing was practised beyond sea before; for the statute speaks of *new manufactures within the realm*; so that if they be new here, it is within the statute, for the act intended to encourage new devices useful to this kingdom, and whether learned by travel, or by study, it is the same thing. Edgeberry v. Stephens, 2 Salk. 147.

2. This action was adjudged to lie against the defendant, who was lessee for years, for preventing the plaintiff who had the reversion in fee, from coming on the lands to see if there had been any waste committed, and this though it was not shewn that any waste had been done. Hunt v. Downman. Cro. Jac. 478.

3. This action lies at the suit of a parishioner, for *excluding him from the vestry-room*, but it must be averred, that the parish had a property in the room, and a right to meet there, or otherwise it might be taken to be the defendant's own room, to which he might only admit whom he pleased. Philly-brown v. Ryland, 1 Stra. 624.

*4. "Where any consequential injury arises to another "from a *breach of trust*, the remedy is by action on the "case." *P. 442.

As where plaintiff declared that he was a wheeler, and possessed of several tools relating to his trade, *viz.* an ax, &c. and by licence of the defendant deposited them in his house; that defendant had detained them after request for two months, whereby he lost the advantage of his trade for that time; the plaintiff had a verdict, and it was moved in arrest of judgment, that the action should have been trover or detinue. But the court held the action well brought; for if the plaintiff had his goods again, detinue would be improper: and though a detainer upon request is evidence of conversion, yet it is not a conversion, and the damages demanded in this case being special, the action ought to be so too. Kettle v. Hunt, Mich. 27 Car. 2. C. B. Bull. N. P. 78.

"For it is no objection to this action that another will lie "for the same offence."

As where plaintiff declared that he was master of a ship, which being laden and ready to sail, was seized by the defendants, whereby he lost the profits of his voyage, it was objected, that the action should be trespass *vi et armies*; but *per Holt*, the plaintiff declares not as owner, but as an officer Pitts v. Gaince & al. Salk. 20.

ficer for a particular loſs, and for it in this action he ſhall recover; though he might have had treſpaſs on the poſſeſſion. But the plaintiff does not declare for the tort itſelf, (the ſeizing of the ſhip,) but for the conſequential injury, the loſs of the voyage.

*P.443. * I ſhall now proceed to the conſiderations

1. *Of the* PLEADINGS. 2. *Of the* EVIDENCE.

And firſt of the

PLEADINGS *on the Part of the* PLAINTIFF.

1. "The declaration in this action ſhould ſtate *the particular manner* in which the injury complained of has been committed."

Rigg v. Clark, Cro. Eliz. 194. For where the action was for overloading the plaintiff's horſe, whereby he was injured, without *ſhewing how he was overburthened*, the declaration was for that held to be bad.

2. "Though the declaration goes for a longer time than the injury complained of entitles the plaintiff to a remedy for, yet if it is ſo entitled *for any part* of the time laid, he ſhall recover accordingly."

South v. Jones, 1 Stra. 245. As where the plaintiff declared againſt the defendant, as parſon, for not taking away his tithes when ſet out, but ſuffering them to lie to the injury of the plaintiff's graſs, from the 20th of *Auguſt* (the day when the graſs was cut) to the 10th of *December* following: though the declaration demanded damages from the time of cutting, which was wrong, as the parſon was not obliged to take the graſs away till it was made into hay; yet for part of the time, the plaintiff having received an injury, he ſhould recover *pro tanto*.

*P.444. * 3. In declaring on *eſcapes*, if the party eſcapes out of cuſtody in *Eſſex*, and be ſeen abroad in *Hertfordſhire*, the plaintiff may lay his action in *Hertfordſhire*.

Walker v. Griffiths, Mich. 5 Geo. 2. Bull. N. P. 67. † 2. If the plaintiff declares for an eſcape againſt the defendant as bailiff of a liberty, he ought to ſhew that the defendant had *execution and return of writs*.

†Miner v. Hinton, Cro. Car. 329. ‡ 3. If an executor brings a *ſci. fa* on a judgment to his teſtator, and has a judgment on it, whereupon a *ca. ſa.* iſſues, and defendant being taken, eſcapes; in the declaration againſt the ſheriff, plaintiff may declare briefly on the *ſci. fa.* and judgment thereupon; but if he declares, that he ſued out a writ, without ſetting out any judgment, it is an incurable fault.

‡ Gold v. Strode, Carth. 140.

Green v. Rennet, E. 27 G. 3. B. R. Term Rep. 636. 4. Where plaintiff declared againſt the defendant, *an attorney, for negligence* in not ſigning a judgment in a cauſe wherein he had been attorney to the plaintiff, and having ſet out in his declaration the writ under which the defendant in the original action had been arreſted, he miſ-recited it; it was held to be fatal.

5. I

5. In declaring againſt a common carrier, it is ſufficient to declare in general on the cuſtom and undertaking, without ſetting out *any ſum* which the plaintiff was to have paid for the carriage, but merely ſtating it "for reaſonable hire," for the carrier may recover on a *quantum meruit*. Baſtard v. Baſtard, 2 Show. 81.

6. If a *commoner* declares againſt another perſon, whether commoner or not, for an *injury* * *to his common*, he ſhould ſtate the offence to be "That his common, *tam amplo modo habere non potuit ſed proficuum ſuum, inde per totum tempus amiſit*;"—for for ſuch injuries only may *he* have an action. 9 Co. 113. *P. 445.

And ſuch general declaration for deſtroying the graſs, *per quod proficuum, &c.* is good without ſetting out, "that defendant claims a right of common;" for that ſhould be pleaded either by defendant himſelf or given in evidence on the general iſſue. Atkinſon v. Teaſdale, 3 Wilſ. 278.

But in this action, if *againſt the lord of* the ſoil, the declaration ſhould lie as againſt *him*, ſtate a ſurcharge and the particular injury. 3 Wilſ. 290.

So the plaintiff, in his declaration againſt a ſtranger, need ſtate no title in himſelf, for poſſeſſion is ſufficient againſt a wrong-doer; and the diſturbance being the giſt of the action, and the title only inducement, it cannot be traverſed, except the defendant ſets up a title in himſelf and juſtifies, in which caſe the plaintiff in his replication muſt ſet out his title. 4 Mod. 424.

7. Where a *nuiſance* has been continued after a former recovery in an action for the ſame, plaintiff muſt declare for a *continuance* of the nuiſance; for if he declares barely for a nuiſance, the former recovery is a good plea in bar. Johnſon v. Long, 1 Salk. 10.

8. Wherever the action is for a *diſturbance* to an eaſement; as where a perſon claims a * watercourſe over the lands of another, if the action is *againſt the tenant of the freehold* for the diſturbance, the declaration ſhould ſhew a right in the plaintiff either from a grant or by preſcription; but if it does not appear that the land over which the eaſement is claimed is the defendant's freehold, it is ſufficient in the declaration to ſtate the injury only; but then, if the defendant in his plea ſets out a right, the plaintiff muſt not demur, but ſet out his. Vernon v. Goodrich, 1 Stra. 5. *P. 446.

But in declaring againſt defendant for turning a watercourſe, it is good to ſtate it as an *ancient watercourſe*, which has been accuſtomed to run to the plaintiff's mill, without ſetting out any preſcription, for thoſe words are tantamount. Anon. Cro. Car. 499.

9. In declaring for a diſturbance of the plaintiff's *fair*, it is not neceſſary to ſet out any title either by grant or preſcription. Dent v. Oliver, Cro. Jac. 43.

10. "In this action, the day laid in the declaration is not "material, provided the plaintiff can prove the injury for "which the action is brought to have been committed any "time before the bill filed."

As

Foſter v. Bonner, Cowp. 454.

As where the plaintiff declared for an injury to an ancient ferry of which he was poſſeſſed, he had ſued out his *latitat* on the 22d of *Auguſt*, and declared for defendant carrying over paſſengers on the 17th of *Auguſt*, but at the trial could not prove the carrying of any perſons till the 25th of *September*, and a caſe being reſerved, whether ſuch evidence
*P. 447. ſupported the declaration, * being after the time of ſuing out the *latitat*, the court held that evidence of the injury any time before the bill filed, which was in *Michaelmas* term, was good.

2. I now proceed to the PLEADINGS on the part of the

DEFENDANT.

1 Wilſ. 45.

1. "The general iſſue in this action is *not guilty*; and "upon it defendant may give in evidence any matter "which deſtroys the plaintiff's action; for the declaration "charging a particular injury or offence, *not guilty*, denies "ſuch injury or offence."

Duel v. Harding, 9 G. 1. per Raymond, Bull. N. P. 78.

As in caſe for beating plaintiff's ſervant, *per quod ſervitum amiſit*, defendant upon *not guilty* may give in evidence, that plaintiff *did not loſe his ſervice*, for that is the injury charged and denied by not guilty.

2. "So under the general iſſue, defendant may give a "juſtification in evidence, for if he is charged with that as "an offence which is a lawful act, he is not guilty."

Slater v. Swann, 2 Stra. 872.

As where the treſpaſs laid was for beating the plaintiff's horſe, *per quod* he loſt the uſe of him for ſeveral days, the defendant pleaded not guilty, and he was allowed to give in evidence, that he kept a ſhop, and that the plaintiff put his horſe and cart ſo directly before the defendant's door, that the cuſtomers were prevented from coming to his ſhop,
*P. 448. wherefore he * whipped the horſe away, and the defendant had a verdict.

2. In the caſe of eſcapes, by ſtat. 8 & 9 *W.* 3. *c.* 26. § 26. "The marſhal or warden of any priſon ſhall not in any "action for an eſcape againſt them give in evidence, a re-"taking upon freſh ſuit, *except the ſame be ſpecially pleaded.* "Nor ſhall any ſpecial plea be received, unleſs oath be made "in writing by the marſhal or warden, and filed, that the "priſoner did, without defendant's knowledge, privity or "conſent, make ſuch eſcape."

Sir Ralph Bovey's caſe, 1 Vent. 211.

If plaintiff in his declaration ſets out a voluntary eſcape, defendant may plead that he took the party on freſh ſuit, without traverſing the voluntary eſcape; for the alledging it is no wiſe neceſſary to his action, but it ſhould come in in the replication.

Jones v. Pope. 2 Lev. 191.

And note, that actions for eſcapes being founded in *malefi-cio* are not within the ſtatute of limitations.

3. Defendant

3. Defendant, in an action for an eſcape, ſhall never be allowed to plead or give in evidence, that the firſt ſuit was improperly commenced; for as he could juſtify under the proceſs, he ſhall not be allowed to take advantage of any irregularity. Bull v. Steward, 1 Wilſ. 255.

In an action againſt the warden or marſhal, an affidavit under the ſtatute, that the eſcape, "*if any ſuch eſcape there was, without defendant's knowledge," is good with theſe words. Weſtv. Gyles, *P. 449. 2 Black. Rep. 1059.

4. By ſtatute of *Weſt.* 2. *c.* 46. "A commoner may take "in part of the common for a dairy, ſheepcote or curtilage." It is therefore a good plea to an action againſt a commoner for incloſing part of the common, that he did it for ſome of theſe purpoſes But it ſhould appear by the plea that ſuch incloſing was for his own uſe, or for his ſervant or ſhepherd. Nevill v. Hamerton, 1 Lev. 62.

5. "Where either party in this action preſcribes for an "eaſement, the other cannot ſet up a contrary preſcription "without a traverſe of that ſet up by the other."

For where in an action againſt the defendant, for diverting an ancient water-courſe, he pleaded that he was ſeiſed of two cloſes, through which the water ran, and that he and all thoſe whoſe eſtate he had, uſed to water their cattle there in ſaid water, "but that for convenience of watering, they had a right to dig a ditch near the ſaid watercourſe," and ſo concluded without a traverſe, this being a preſcription, varying the firſt, was held to be bad without a traverſe. Murgatroid v. Law, Carth. 117

So where plaintiff declared, that he was entitled by preſcription to a fold-courſe for his ſheep in certain lands, and that defendant had encloſed them, defendant pleaded a contrary preſcription to incloſe, and held bad on demurrer for want of a traverſe. Spooner Day & Cro. Car. 432.

* 2*dly. Of the* EVIDENCE. *P. 450.

Firſt, on the Part of the PLAINTIFF.

And 1ſt. "In all caſes of this action it is neceſſary that "the evidence ſhould ſo apply to the offence or injury "charged, that by no preſumption ſuch offence or injury "can be ſuppoſed to ariſe from any other cauſe."

For where plaintiff declared, that defendant in giving evidence, in an action between the plaintiff and another perſon, had uſed words in derogation of the plaintiff's character, whereby the jury gave him but ſmall damages in that action, this action was held not to lie, for it could not appear how the jury were influenced in their verdict by thoſe words. Harding v. Bodman. Hutt. 11.

2. "In treſpaſs on the caſe, all *material averments* only are put in iſſue, and nothing more, and theſe only are required to be proved."

Winn v. Walker, 2 Black. Rep. 840.

Therefore where plaintiff, in an action againſt his tenant of certain lands, for leaving them out of tenantable repair, declared, firſt as *ſeiſed in fee*, and it was proved that he was only *tenant in tail*, yet it was held not to be a material variance, becauſe that the leaſe of tenant in tail is not void, but voidable only by the iſſue in tail, and could not be avoided during the leſſor's life. 2d. Where he declared, "That the tenant had undertaken to leave it in tenantable repair," and it was proved to be, "To leave it in as good repair as the

P. 451. " tenant found it," it was held not to be a variance, the land being proved to be in tenantable repair when the tenant entered.

Gunter v. Clayton, 2 Lev. 85.

3. In eſcapes, if the plaintiff declares that he had a good cauſe of action againſt *J. S.* and ſued out a *latitat* againſt him, and that the defendant arreſted him, and ſuffered him to eſcape, he muſt prove a cauſe of action, or he will be nonſuited, though the cauſe of action need not be for the ſame ſum mentioned in the declaration; but if the declaration be of a *latitat* in a plea of treſpaſs, and the writ produced be of a plea of treſpaſs, *ac etiam billæ* 20*l.* it will not ſupport the declaration.

Tildar v. Sutton, Paſch. 2 Ann. per Holt.

2. Plaintiff in an action for an eſcape need neither produce the *ca. ſa.* nor the copy of it, but the return is ſufficient; neither need the *ca. ſa.* be ſet forth in the declaration. But if it be ſet forth with a *ſcilicet*, that it iſſued ſuch a day,

Johnſon v. Gibbs, per Holt, at Exon.

it may be doubtful, whether he ought not to prove the *ca. ſa.* with a true teſte; otherwiſe, againſt the ſheriff the warrant to the bailiff is ſufficient evidence, though it would not be

Bull. N. P. 66.

ſo for him.

Rex v. Ford, 2 Salk. 690.

3. To prove a voluntary eſcape, the party eſcaping may be a witneſs, for it is a matter of ſecrecy between him and the gaoler.

So is the confeſſion of the under-ſheriff good evidence to

Ld. Raym. 190.

charge the ſheriff, for in effect it charges himſelf.

*4. If the action is brought for a *reſcue*, the plaintiff muſt

*P. 452. prove, 1. The original cauſe of action. 2. The writ and warrant, which muſt be by producing ſworn copies. 3. The

Wilſon v. Geary, 6 Mod. 211.

arreſt, to ſhew it legal. 4. In point of damage, it is expedient to prove that the perſon arreſted has become inſolvent, or is not to be found; but this is not *neceſſary* to ſupport the action, for the defendant having been guilty of a breach of the law, ſhall find no favour.

Jarvis v. Hayes, 2 Stra. 1083.

5. In an action *againſt the maſter* for an injury *done by the ſervant*, the ſervant is an inadmiſſible witneſs, *unleſs* he ſhews a releaſe from his maſter; for if the plaintiff recovers againſt the maſter, the ſervant is liable over to him for his own miſconduct; and if plaintiff fails againſt the maſter, he may ſue the ſervant, ſo that either way he is *intereſted*.

"But where the injury is done in the maſter's company, "and not by the ſervant alone, there he is a good witneſs."

Therefore

Therefore in an action against the master, for that by the negligently managing his barge, he had run down that of the plaintiff, *Lee*, Ch. Just. examined all the men to prove no neglect, the master himself being then asleep in the cabin. Bull. N. P. 77.

" But where the action is *by* the master for an injury done " to the servant, with a *per quod serv. amisit*, there the ser- " vant may be an evidence (though the case of *Dunsley* v. " **Westbrown*, 1 *Stra.* 414. is *contra*) from the authority of " the following cases." *P. 453.

The servant beaten was in this case allowed to be a good witness on an action brought by the master. Duel v. Harding, 1 Stra. 595.

So in an action for defendant's dog having bit the plaintiff's apprentice, *per quod servit. amisit*, the apprentice was admitted as a witness. Lewis v. Fogg, 2 Stra. 944.

So where the action was for debauching the plaintiff's daughter, the daughter was examined as a witness. Cock v. Watham, 2 Stra. 1054.

For in these actions, the servant is no way interested in the event, the action being given to the master, not for the injury, but for the consequences of the injury.

5. In an action against a *carrier*, the plaintiff ought to prove that defendant used to carry goods for hire, and that the goods were delivered to him or his servant to be carried; and if a price be alledged in the declaration, it ought to be proved to be the usual price of such a stage, but there needs no proof of a price certain; and if a price be proved, there needs no proof that defendant is a common carrier, *for every one carrying for hire is deemed so in law.* Per Holt, at Horsham, 13 W. 3. Bull. N. P. 73.

So where the plaintiff declared against the carrier, on his undertaking to carry for a certain price to be paid by the *consignor*, and on *evidence it appeared, that it was to have been paid by the consignee, it was held to support the declaration. Moore v. Wilson, E. 26 G. 3. *P. 454. B. R. 1 Term. Rep. 659.

7. If plaintiff's action is for a surcharge of his *common*, he need not shew that he had actually turned away any cattle on the common, at the time of the surcharge laid; it is sufficient to shew, that from the number turned in by defendant, he *could not have enjoyed* his common in so ample a manner as he was entitled. Wells v. Watling, 2 Black. Rep. 1233.

8. If the action is for disturbing the plaintiff in taking the profits of an office, it is sufficient to prove the value, *communibus annis*, not every particular sum received. Lord Montague v. Lord Preston, 1 Vent. 171.

dly. Of the EVIDENCE *on the Part of the* DEFENDANT.

1. In the case of escapes, the gaoler or officer can take no advantage of the error in the process; and so if he pleads to escape, it seems he shall not be allowed to plead no arrest, for the plea admits the arrest. Rex v. Fell, 2 Salk. 272.

Wilſon v. Geary, 6 Mod. 211.

2. In caſes of reſcue, the defendant may give in evidence, in mitigation of damages, the ability of the perſon reſcued, and that he ſtill is amenable to juſtice; yet if the jury give the whole debt in damages, no new trial will be granted. And in this caſe, the party reſcued may be an evidence, and though *particeps criminis*, if defendant be guilty, yet ſhall this *only go to his credit, not to his competence.

*P. 455. Powel v. Hord, 1 Stra. 649.

3. In an action for a *falſe return* of *non eſt inventus* on meſne proceſs, the ſheriff's bailiff is an inadmiſſible witneſs to prove an endeavour to execute the writ, for he has given ſecurity to the ſheriff, ſo that it is his own cauſe in effect.

4*th*. The VERDICT, JUDGMENT AND COSTS

Now only remain to be conſidered.

1. It ſeems a general deſcription of the verdict in this action, that if the ſubſtance of the iſſue is found it is ſufficient.

King v. Andrews, Cro. Jac. 380.

As where in an eſcape plaintiff declared on a taking by the defendant, the then ſheriff, and it appeared that he had been taken by a former ſheriff, but handed over in cuſtody to defendant, the iſſue was held to be well found.

Oates v. Machen, 1 Stra. 595.

So where the declaration in eſcape alledged that the priſoner was ſurrendered at the juſtice's chambers in the pariſh of St. *Bride*, and it was found to be in St. *Dunſtan's*, it was yet held to be good.

Ferror v. Johnſon, Cro. Eliz. 33.

So where in a caſe for diſturbing plaintiff in an office, he made a ſpecial title, and the jury found a title variant from that ſo ſet out, yet plaintiff had judgment.

*P. 456. Gravenor v. Meers, Cro. Eliz. 884.

*And laſtly, in a caſe on the ſale and warranty of *two* oxen, and the jury found a verdict as to the ſale of *one*, of the variance alledged, the court over-ruled it, for the action was on the *deceit*, not on the warranty.

Powel v. Hord. 1 Stra. 649.

2. In an action againſt the ſheriff for a falſe return of meſne proceſs, the jury may give the whole debt in damages.

Of the Coſts.

By ſtat. 2 *W. & M. ſ.* 1. *c.* 5. "Treble coſts and damages "are given againſt a perſon guilty of a reſcous of a diſtreſs."

Lawſon v. Storie, Salk. 205.

If plaintiff brings a caſe on this reſcous, which he might do by common law, he ſhall recover treble coſts as well as treble damages.

THE

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Wilson v. Geary, 6 Mod. 211.

2. In cases of rescue, the defendant may give in evidence, in mitigation of damages, the ability of the person rescued, and that he still is amenable to justice; yet if the jury give the whole debt in damages, no new trial will be granted. And in this case, the party rescued may be an evidence, and though *particeps criminis*, if defendant be guilty, yet shall this *only go to his credit, not to his competence.

*P. 455.

Powel v. Hord, 1 Stra. 649.

3. In an action for a *false return* of *non est inventus* on mesne process, the sheriff's bailiff is an inadmissible witness to prove an endeavour to execute the writ, for he has given security to the sheriff, so that it is his own cause in effect.

4*th*. The VERDICT, JUDGMENT AND COSTS

Now only remain to be considered.

1. It seems a general description of the verdict in this action, that if the substance of the issue is found it is sufficient.

King v. Andrews, Cro. Jac. 380.

As where in an escape plaintiff declared on a taking by the defendant, the then sheriff, and it appeared that he had been taken by a former sheriff, but handed over in custody to defendant, the issue was held to be well found.

Oates v. Machen, 1 Stra. 595.

So where the declaration in escape alledged that the prisoner was surrendered at the justice's chambers in the parish of St. *Bride*, and it was found to be in St. *Dunstan's*, it was yet held to be good.

Ferror v. Johnson, Cro. Eliz. 33.

So where in a case for disturbing plaintiff in an office, he made a special title, and the jury found a title variant from that so set out, yet plaintiff had judgment.

*P. 456.

Gravenor v. Meers, Cro. Eliz. 884.

*And lastly, in a case on the sale and warranty of two oxen, and the jury found a verdict as to the sale of *one*, on the variance alledged, the court over-ruled it, for the action was on the *deceit*, not on the warranty.

Powel v. Hord. 1 Stra. 649.

2. In an action against the sheriff for a false return of mesne process, the jury may give the whole debt in damages.

Of the Costs.

By stat. 2 *W. & M. s.* 1. *c.* 5. "Treble costs and damages are given against a person guilty of a rescous of a distress."

Lawson v. Storie, Salk. 205.

If plaintiff brings a case on this rescous, which he might do by common law, he shall recover treble costs as well as treble damages.

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